TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1914

No. [redacted] 119

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS *EX REL.* HAL L. NORWOOD,
ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED FEBRUARY 27, 1913.

(23,566)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 470.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS *EX REL.* HAL L. NORWOOD, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1914.

1 *Caption.*

Pleas.

Before the Honorable John E. Martineau, Chancellor of the Chancery Court, of Pulaski County, Arkansas, at its April Term A. D. 1912, on the 25th day of July, A. D. 1912, a day of said term in the following entitled action, to-wit:

14695.

STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Plaintiff,
vs.
ST. LOUIS S. W. RY. CO., Defendant.

2 *Complaint.*

In the Pulaski Circuit Court.

14695.

THE STATE OF ARKANSAS on Relation of HAL L. NORWOOD, Attorney-General, Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RY. CO., Defendant.

Complaint at Law.

Comes the State of Arkansas on relation of Hal L. Noorwood, her duly authorized and qualified Attorney General, and represents and shows to the Court as follows:

That the St. Louis and Southwestern Ry. Company, the above named defendant, is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, having its domicile at the city of St. Louis in said State; that it owns, operates and maintains a system of railroads in this and other States; and that it was at and prior to the institution of this suit engaged in doing business as a common carrier in this State; carrying for hire both passengers and freight between stations in this State and between stations in this State and stations in other States; said defendant being engaged in both intrastate and interstate commerce; that said corporation, the defendant aforesaid, was at, and prior to the institution of this suit, and is now, exercising its corporate functions under authority and by virtue of the laws of this State, and
3 is engaged in doing a corporate business within the State of Arkansas.

That on August 1st, 1911, said defendant was liable to the State of Arkansas for the payment of a franchise tax levied against it

under and by virtue of an Act of the General Assembly of the State of Arkansas entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas" approved March 23rd, 1911, and an Act of the General Assembly of the State of Arkansas, entitled "An Act to amend an Act of the General Assembly entitled "An Act for an Annual Franchise Tax on Corporations doing business in the State of Arkansas, Approved March 23, 1911", Approved May 25th, 1911. Copy of each of said above mentioned Acts being hereto attached, marked Exhibits "A" and "B" respectively, and made a part hereof.

That said defendant proceeding under and by virtue of said Acts aforesaid did, on the 1st day of July, 1911, file with the Arkansas Tax Commission the return and schedule required by said Act Approved March 23rd, 1911; a copy of said return and schedule being hereto attached marked Exhibit "C", and made a part hereof.

That said Arkansas Tax Commission proceeding under the authority vested in it by the laws of the State of Arkansas, and having under consideration the proper franchise tax due and payable by the above mentioned defendant for the privilege of doing a corporate business in this State, did, on the 20th day of July, 1911, designate and fix the said franchise tax at the sum of $6,798.26; that a true and correct copy of the records of said Arkansas Tax Commission showing its proceedings in the premises is hereto attached, marked Exhibit "D" and made a part hereof.

4 That on the 20th day of July, 1911, the Arkansas Tax Commission certified to the Auditor of the State the amount of franchise tax due and payable by this defendant at the said sum of $6,798.26; that said certificate was filed in the office of the Auditor of State on the 21st day of July, 1911.

That on the 25th day of July, 1911, the Hon. John R. Jobe, Auditor of the State of Arkansas, certified to the State Treasurer the amount of franchise tax due and payable by the above named defendant at the above named sum of $6,798.26.

That under and by virtue of the Acts of the General Assembly aforesaid, copies of which are attached hereto, it then and there became the duty of this defendant on and after the 1st day of August, to pay to the State Treasurer the said sum of $6,798.26 as a franchise tax fixed, designated, and certified against it for the privilege of doing a corporate business within the State of Arkansas.

That said defendant was in due time notified by the Treasurer of the State of the amount by it due on account of its franchise tax, but that it failed, neglected and refused to pay said sum of $6,798.26, or any part thereof, and that it continues to fail, neglect and refuse to pay said sum or any part thereof, and that said failure, neglect and refusal upon its part is wilful and without just cause.

That on the 15th day of September 1911, Hon. Jno. W. Crockett, Treasurer of the State of Arkansas, certified to the Auditor of the State the fact that the said defendant had failed, neglected

5 and refused to pay the franchise tax aforesaid, or any part thereof, and that said defendant was a delinquent tax payer.

Whereupon, on the said 15th day of September, 1911, the Hon. Jno. R. Jobe, Auditor of State, proceeding under and by virtue of

the power and authority of the Acts of the General Assembly aforesaid, certified to the Attorney General of the State of Arkansas the fact that this defendant had failed, neglected and refused to pay said franchise tax amounting to the sum of $6,798.26 or any part thereof, and extended against said defendant the penalty prescribed and required by the Acts of the General Assembly aforesaid of twenty-five per centum, which said penalty amounts to $1,699.56.

That the Attorney General proceeding under the Acts of the General Assembly aforesaid has demanded of said defendant the payment of said tax and penalty amounting in the aggregate to the sum of $8,497.82, which amount is now due and payable by said defendant, on account of its franchise tax aforesaid and the penalty accrued against it for its failure to pay said franchise tax on or before the 10th day of August, 1911.

That said defendant has failed, neglected and refused to pay said franchise tax, or any part thereof, and has failed, neglected and refused to pay said penalty or any part thereof; that said defendant has failed, neglected and refused to pay the said sum of $8,497.82 tax and penalty, or any part thereof, and at this date fails, neglects and refuses to pay said tax and penalty, or any part thereof, although demand has been made upon it therefor.

6 Wherefore, premises considered, plaintiff prays for judgment against said defendant in the sum of $8,497.82, with interest from the 15th day of September, 1911, for its costs in this behalf laid out and expended and for all other proper relief.

Respectfully submitted,

HAL L. NORWOOD,
Attorney General.
WM. H. RECTOR,
Assistant Attorney General.
BRADSHAW, RHOTON & HELM,
Special Counsel.

Indorsed and Filed November 16th, 1911. F. J. Ginocchio, Clerk.

7 & 8 EXHIBIT "C."

To the Arkansas Tax Commission:

At the request of the Secretary of State of the State of Arkansas, pursuant to the requirements of Act No. 112, approved March 23rd, 1911, the St. Louis Southwestern Railway Company makes to you the following report as required by Sections Four and Five of said Act.

Schedule.

1st. (*a*) The name of the corporation; St. Louis Southwestern Railway Company.

(*b*) Under the laws of what State or country organized: Organized under the laws of the State of Missouri.

2nd. Location of its principal office: St. Louis, Mo.

3rd. (*a*) President; Edwin Gould, New York, N. Y.
(*b*) Secretary; Arthur J. Trussell, New York, N. Y.
(*c*) Treasurer; G. K. Warner, St. Louis, Mo.
(*d*) Members of the Board of Directors:
Edwin Gould, New York, N. Y.
F. H. Britton, St. Louis, Mo.
Wm. H. Taylor, New York, N. Y.
R. M. Gallaway, New York, N. Y.
E. T. Jeffery, New York, N. Y.
Howard Gould, New York, N. Y.
9 Murray Carleton, St. Louis, Mo.
Winslow S. Pierce, New York, N. Y.
Tom Randolph, St. Louis, Mo.

4th. The date of the annual meeting of the officers; First Tuesday in October.

5th. (*a*) The amount of the authorized capital stock; $55,000,000.00.
(*b*) The par value of each share; $100.00.

6th. (*a*) The amount of the capital stock subscribed; ——.
(*b*) The amount of the capital stock issued and outstanding; $36,249,750.00.
(*c*) The amount of the capital stock paid up; $36,249,750.00.
(*d*) The market value of same:

Common	$16,356,100.00	
31.50 per share		$5,152,171.50
Preferred	$10,893,650.00	
$68.50 per share		$13,627,150.25
Total		$18,779,321.75

7th. (*a*) The nature and kind of business in which the company is engaged; State and interstate transportation of passengers and property.
(*b*) Its place of business both within and without the State of Arkansas; St. Louis, Missouri, and various stations along its lines in Arkansas.

8th. (*a*) The name and location of its office or offices in the State of Arkansas; At various stations along its lines in the State of Arkansas.
10 (*b*) The names and addresses of officers or agents of the corporation in charge of its business within the State of Arkansas; the business of the company is transacted by various offices and numerous agents in the State, the names and addresses of whom will be of no service to the Tax Commission.

9th. (*a*) Value of property owned and used by the Company in the State of Arkansas; $19,887,387.79.
(*b*) Where situated; See Tax Return.
(*c*) Value of the property owned and used by the Company outside of the State of Arkansas; $37,353,566.46.

10th. The change or changes, if any, in the above particulars made since last annual report: None.

The values given in this report cover and include the property of the St. Louis Southwestern Railway Company, which owns all of the stock and bonds of the St. Louis, Southwestern Railway Company of Texas, and on which are bottomed the stocks and bonds of the St. Louis Southwestern Railway Company; the total value of the property in the State of Arkansas and elsewhere—$57,240,954.25, is the market value of the capital stock and bonds of the St. Louis, Southwestern Railway Company on June 5th, 1911, covering 1,315.65 miles of railroad operated by the St. Louis, Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas.

In making this report the St. Louis, Southwestern Railway Company does not admit the validity or legality of Act No. 112
11 of the State of Arkansas, approved March 23, 1911, but gives the information herein contained out of a desire to avoid the appearance of not complying with the reasonable regulations of the State of Arkansas, and the St. Louis Southwestern Railway Company denies that this report is necessary or essential as a condition precedent to its continuing to transact business in the State of Arkansas, both State and interstate, and it reserves the right to contest the validity of the Act referred to or any taxes to be levied thereunder and by appropriate means to resist the enforcement thereof.

12 STATE OF MISSOURI,
City of St. Louis:

I, W. A. Conaway, Tax Agent of the St. Louis Southwestern Railway Company, do solemnly swear that the foregoing statement as now rendered by me on behalf of the St. Louis, Southwestern Railway Company, is a true, full and correct statement of facts, in answer to the above queries, made at the close of business on the the 5th day of June, 1911, so help me God.

W. A. CONAWAY,
Tax Agent.

Subscribed and sworn to before me, this, the 30th day of June, 1911.

[SEAL.] MARGARET LALLY,
Notary Public.

My Commission expires Jan. 11th, 1913.

13 *Indorsement.*

This Company has in Arkansas a total of 493.47 miles (including lines owned and controlled). According to this statement it owns and operates all told 1315.65 miles of road. The Arkansas property is easily worth mile for mile as much as the property elsewhere. The total capitalization of the road is $36,249,750.00.

It is more than fair to the road to assign to Arkansas that part of its capitalization represented by 493.47 miles.

Therefore 1315.65 : 493.47 Miles $36,249,750.00 : x Equals
2 $13,596,522

6,798.26
Foreign Franchise Tax Notice.
St. Louis Southwestern Ry. Co.
Filed July 1st, 1911.

A. C. MARTINEAU,
Secretary.

July 18th, entered.

14 EXHIBIT "D."

Franchise Tax of Corporations Fixed by the Tax Commission.

OFFICE OF TAX COMMISSION,
LITTLE ROCK, ARK.,
OLD STATE HOUSE, *July* 20, 1911.

The Arkansas Tax Commission, all members being present, has under consideration all the Franchise Tax Reports that have been filed with the Tax Commission, up to and including this date, of Domestic and Foreign Corporations having a capital stock, of foreign and domestic corporations having no capital stock, of foreign and domestic insurance companies having no authorized capital stock, and of building and loan associations doing business in this State.

After an examination of all franchise tax reports that have been filed with the Tax Commission up to and including this date, of foreign corporations having a capital stock and doing business in this State on the 1st day of July, 1911, the Tax Commission does hereby fix the proportion of the outstanding capital stock represented by property owned and used in business transacted in this State, and the Franchise Tax for the Year 1911, of the said several foreign corporations to be such sums as are shown, under the proper headings and opposite the name of the corporation, on pages one (1) to one hundred (100) inclusive, of that department designated "Annual franchise Tax Record, 1911-12, Arkansas" of this office.

15 In fixing the subscribed or issued and outstanding capital stock, employed or used in this State, and the amount of Franchise Tax to be paid by each of the corporations and companies referred to above as having filed their reports before July 21st, 1911, the Tax Commission has accepted their reports as true and determined the amount of capital stock employed or used in this State and franchise tax from said reports, except the following named corporations.

In fixing the capital stock and franchise tax of the following corporations, the Commission after having duly considered and investigated the reports of said corporations, found the same to be incomplete in some particulars, and after obtaining the information so lacking and noting the same, in many instances on the back of the report of said corporations, has found the capital stock and franchise

tax as is indicated by record book mentioned above, and also the follows:

Foreign Corporations.

Name of Corporations.	Subscribed Capital Stock	Franchise Tax.
St. Louis Southwestern Ry Co.	$13,596,520.00	$6,798.26

The Commission also directs its secretary to certify, on this date, a copy of the companies and corporations, with the amount of
16 their subscribed or issued and outstanding capital stock and franchise tax of each, as set out in the first paragraph, to the Auditor of State, Jno. R. Jobe.

L. M. BURGE, *Chairman;*
DAVID A. GATES,
F. E. BROWN,
State Tax Commissioners.

A. C. MARTINEAU,
Secretary of Ark. Tax. Com.

17 EXHIBIT "A."

Act. 112.

An Act for an Annual Franchise Tax on Corporations Doing Business in the State of Arkansas.

Be it enacted by the General Assembly of the State of Arkansas:

Be it enacted by the people of the State of Arkansas:

SECTION 1. Each corporation organized and doing business under the laws of this State, for profit, shall make a report in writing to the Arkansas Tax Commission, if in existence, and if not, to the assessor of the county of the domicile of said corporation, annually, on or before July 1, in such form as the commission may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice president, secretary or general manager of the corporation.

SECTION 2. Such report shall contain:

1. The name of the corporation.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The amount of authorized capital stock.

5. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, the amount of capital stock paid up, and the par and market value of such stock.

6. The nature and kind of business in which the corpora-
18 tion is engaged, and it- place of business.

7. The amount of its capital stock employed and the value of its property within this State, and the amount of its capital stock

employed and the value of its property without the State, except as hereinafter provided.

8. The change or changes, if any, in the above particulars, made since the last annual report.

SECTION 3. Upon the filing of the report provided for in sections 1 and 2 of this Act, the commission, or tax assessor, as the case may be, after finding such report to be correct, shall report to the Auditor of State, who shall charge and certify to the Treasurer of State for collection, on or before July 20, as herein provided from such corporation, a tax of one-twentieth of one per cent upon that part of its subscribed or issued and outstanding capital employed in Arkansas, except as hereinafter provided.

SECTION 4. Each foreign corporation for profit, doing business in this State, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the Arkansas Tax Commission annually, — or before July 1, and if such tax commission shall have been abolished by law, then the assessor of the county in which the principal place of business of such corporation in this State shall be.

SECTION 5. Such report shall contain:

1. The name of the corporation and under the laws of what State or county organized.

19 2. The location of its principal office.

3. The names of the president, secretary, treasurer, and members of the board of directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, the amount of capital stock paid up, and the market value of same.

7. The nature and kind of business in which the company is engaged, and its place or places of business, both within and without this State.

8. The name and location of its office or offices, in this State, and the names and addresses of the officers or agents of the corporation in charge of its business in this State.

9. The value of the property owned and used by the company in this State, where situated and the value of the property owned and used outside of this State.

10. The change or changes, if any, in the above particulars made since the last annual report.

SECTION 6. Upon the filing of the report provided for in sections 4 and 5 of this Act, the commission or assessor, as the case may be, from the facts thus reported and any other facts coming to its or his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in this State on or before July 20, and

shall report the same to the Auditor of the State, who shall
20 charge and certify to the Treasurer of the State on or before August 1, for collection as herein provided, annually from such company, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State.

SECTION 7. Each corporation organized under the laws of this State and each foreign corporation doing business in this State for profit having no capital stock, shall make a report in writing to the commission annually on or before July 1, in such form as the commission may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice president, secretary or other chief officer of the corporation, and forwarded to the commission, or tax assessor, as herein provided, if the commission should be abolished.

SECTION 8.—

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of trustees, or directors, with postoffice addresses of each.
4. The date of the annual election of officers.
5. The nature of the business which such corporation is engaged in carrying out.

SECTION 9. Upon the filing of the report provided for in sections 7 and 8 in this Act, the commission, or assessor, as the case
21 may be, shall report to the Auditor of State on or before July 20, of every year, who shall charge and certify to the Treasurer of State, on or before August 1 of every year, for collection as herein provided, a fee of twenty dollars for each corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for benevolent or charitable purposes, and having no capital stock, or of a company or association organized to transact business of life or accident, or of life and accident insurance on the assessment plan, for the purpose of mutual protection and benefit to its members, and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof. All foreign or domestic life, fire, accident, surety, liability, steam boiler, tornado, health, or other kind of insurance company of whatsoever nature doing business in this State, having an outstanding capital stock of less than $500,000.00 shall pay an annual fee of $50.00, and all other such insurance companies having a capital stock of more than $500,000.00, an annual fee of $100.00 for the privilege of doing business in this State, and all building and loan associations shall pay an annual fee to the State of $25.00 for the privilege of doing business in this State; in place of fees based on the capital as hereinbefore provided.

SECTION 10. Upon the filing of the report and the payment of

the fee provided for in sections 1 to 9 of this Act, inclusive, to the Treasurer of State the Auditor of State shall make out and deliver to the corporation paying, a certificate of the compliance by such corporation with the said sections of this Act, and the payment of the annual fee provided for therein. The Auditor of State shall make a report to the commission, or if the commission be abolished by law, then to the Secretary of State, of the annual fee so collected.

SECTION 11. The Secretary of State shall prepare and keep a correct list of all corporations subject to the provisions of sections 1 to 9, inclusive, of this Act, and engaged in business within the State, and shall on July 1 each year certify a copy of this list to the Arkansas Tax Commission, or to the Secretary of State if the commission be abolished, and shall monthly thereafter file with the commission certified report showing all corporations, the increase or decrease of the capital stock, or the dissolution of existing corporations and such other information as the commission or Secretary of State, as case may be, may require. For the purpose of obtaining other information, the Secretary of the State or the commission shall have access to the records of the offices of the county clerks of the State.

SECTION 12. The taxes provided for by this Act shall be due and payable on or before August 10 each year. All taxes shall be by the Treasurer of State credited to the general revenue fund. If any corporation refuses to pay on or before the 10th day of August, the taxes assessed against it, the Treasurer of State shall certify a list of such corporations so delinquent to the Auditor of State, who shall add to the tax due, a penalty of twenty-five per cent thereon, and forthwith certify the same to the Attorney General for collection. The Attorney General shall proceed forthwith to collect the same, and the amount so collected shall be paid into the State Treasury and credited to the general revenue fund. Suits for the collection of such tax may be brought in the name of the State, or in any other county in which such corporation has its domicile, and if a foreign corporation, in the county of its principal place of business.

SECTION 13. On or before September 10, each year, the Arkansas Tax Commission, or the various tax assessors, as the case may be, shall file with the Secretary of State a written statement containing the name of each company which has complied with the provisions of this Act during the year next preceding.

SECTION 14. The taxes and penalties required to be paid by the provisions of this Act shall be the first lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business, or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors or stockholders thereon.

SECTION 15. If a corporation orga-ized under the laws of Arkansas or any foreign country authorized to do business in this State for profit, and which is required to file the record and pay the tax prescribed in this Act, fails or neglects to make such report, or to pay such tax for thirty days after the expiration of the time limited

by this Act, and such default is wilful, and intentional, the Attorney General or the prosecuting attorney of the district, on the request of the tax commission, or the assessor of the county, as the case may be, shall bring an action in the circuit court of Pulaski County, or any other county in this State in which the domicile or principal place of business of such corporation is located, to forfeit and
24 annul the charter of such corporations. If the court is satisfied that such default is wilful and intentional it shall revoke and annul such charter.

SECTION 16. Any county clerk or assessor, upon the request of the Secretary of State or the Arkansas Tax Commission shall furnish such information as is shown by the records of his office concerning such corporations located within his county, and subject to the provisions of this Act. The commission, or assessor of the county, as the case may be, for determining this amount of tax due for such corporation, may investigate and determine the facts shown in the proportion of the authorized capital stock of the company represented by its property and business in this State.

SECTION 17. The Secretary of State shall cause to be prepared suitable blanks for the carry*out* out the purpose of this Act and shall furnish such blanks to each corporation or association subject thereto.

SECTION 18. All insurance companies, building and loan associations, and corporations, the fees of which are fixed in lump sums by this Act, and all corporations which employ all of its property and all of its outstanding capital stock in this State, or which will report and pay the fees on all of its outstanding capital stock, whether employed in this State or not, shall not be required to set out in reports required by this Act, the value of its property within this State, or without this State.

25 SECTION 19. If any corporation subject to the provisions of this Act fails or refuses to make answers to the questions contained in such reports required to be filed by them, then said commission may require delinquent corporations, their officers, agents, or employees to furnish information concerning their capital stock which is necessary in determining the amount of the tax to be paid by them, and for that purpose said commission may summon witnesses to appear and give testimony and to produce records, books, papers, documents, and all other information of any kind or character, relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpœna issued by any member of the commission, or the secretary thereof, in the name of the commission, directed to any sheriff of Arkansas and returnable to the commission, which commission shall be served in like manner to the same effect, and under similar conditions, as is issued out of the circuit court. The commission is also authorized to cause the deposition of witnesses residing within or without the State, or absent therefrom, to be taken upon notice to the interested party, if any, in like manner that depositions of witnesses are taken in civil actions in the circuit court in any matter which the commis-

sion may have authority to investigate and determine. Oaths witnesses in any matter under the investigation or consideration the commission may be administered by the secretary or any mer ber thereof. In case any witness shall fail to obey any summo or appear before said commission, or shall refuse to testify or a swer any material question, or to produce records, books, papers documents, when required so to do; such failure or refusal sha be reported to the Attorney General or the prosecuting a
26 torney of the district in which such corporation has i principal place of business, who shall thereupon proceed i the proper course to compel obedience to any summons or prope order of the commission, or to publish witnesses for any impropc neglect or refusal. Any witness who shall knowingly or wilfull give a false answer to any question propounded in any such swor examination, where the fact inquired of is within his knowledge shall be deemed guilty of perjury. It shall be unlawful for an member of the Arkansas Tax Commission or for any officer o employee of said commission, or for any other office- or employe of the State to divulge or make known in any manner whateve not provided by law to any person, any information obtained b him in the discharge of his official duties; or to divulge or make known in any manner not provided by law any document revised evidence taken, or report made under this Act. Any offense against the foregoing provisions shall be a misdemeanor, and shall be pun ished by a fine of not exceeding one thousand dollars, or by impris onment in the county jail not exceeding six months.

SECTION 20. When any corporation shall have paid the franchise tax prescribed by this Act, the State Tax Commission, or Secretary of State, if the tax commission be abolished, shall issue to it a cer tificate authorizing it to do business in this State for the term of five years from the date thereof upon condition that it pay annually the franchise tax prescribed by this Act, and such certificate shall be evidence in all the courts of this State of the right of such corporation to do business in this State during the term of such certificate.

In case any corporation shall fail to pay the franchise tax
27 prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act.

SECTION 21. Act No. 260 of the Acts of the General Assembly of 1909, and Act No. 443 of the Acts of the General Assembly of 1907, and all other laws and parts of laws in conflict herewith are hereby repealed and this Act shall take effect and be in force from and after its passage.

Approved March 23, 1911.

28 EXHIBIT "B."

Act 313.

An Act for An Annual Franchise Tax on Corporations Doing Business in the State of Arkansas. Approved March 23, 1911.

Be it enacted by the People of the State of Arkansas:

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That section (9) nine of an Act entitled "An Act for the annual franchise tax on corporations doing business in the State of Arkansas," approved March 23, 1911, be amended so as to read as follows:

SECTION 9. Upon the filing of the report provided for in section 7 and 8 in this Act, the commission or assessor, as the case may be, shall report to the Auditor of State on or before July 20th of every year, who shall charge and certify to the Treasurer of State on or before August first of every year for collection as herein provided, a fee of fifty dollars ($50.00) for each corporation organized as a mutual corporation not having a capital stock, or any other corporations not organized strictly for benevolent or charitable purpose and have no capital stock, or for a company or an association organized to transact business of life, or accident or of life and accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members, and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof.

29 All foreign or domestic life, fire, accident, surety, liability, steam-boiler, tornado, health or other kinds of insurance companies of whatsoever nature doing business in this State having an outstanding capital stock of less than five hundred thousand dollars ($500,000), shall pay an annual fee of $100.00, and all other such insurance companies having a capital of more than five hundred thousand dollars ($500,000), an annual fee of $200.00 for the privilege of doing business in this State, and all building and loan associations shall pay an annual fee to the State of Twenty-five dollars ($25.00) for the privilege of doing business in this State; in place of fees based on the capital as hereinafter provided.

SECTION 2. That section 21 of said Act be amended so as to read as follows:

SECTION 21. That Act No. 260 of the Acts of the General Assembly of 1909 and Act No. 443 of the Act of the General Assembly of 1907 and all other laws and parts of laws in conflict with this Act are hereby repealed and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage.

SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage.

Approved May 26, 1911.

30 In the Pulaski Circuit Court.

14695.

THE STATE OF ARKANSAS on Relation of HAL L. NORWOOD, Attorney General, Plaintiff.

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Answer.

The defendant, St. Louis Southwestern Railway Company, for its answer to the complaint herein, says:

It admits that it is a railway corporation incorporated under the laws of the State of Missouri and having its domicile at the city of St. Louis, in said State, as alleged; it admits that it owns and operates and maintains a railroad in this and other States, and that it is a common carrier carrying for hire both passengers and freight in this State and other States; that it is engaged in both intrastate and interstate commerce, as alleged; it admits that it is doing an intrastate business in the State of Arkansas under the laws of said State.

Defendant denies that on August 1, 1911, or since that time, it was liable to the State of Arkansas for the payment of a franchise tax levied against it under the act mentioned in said complaint, approved March 23rd, 1911, and the amendment thereto, approved May 26th, 1911, as set out in said complaint aforesaid; defendant states that said acts as to this defendant are illegal, null and void for the reason hereinafter stated and set out.

31 Defendant admits that it filed on the 1st day of July, 1911, with the Arkansas Tax Commission the return and schedule required by said act, approved March 23, 1911, but defendant says that said return and schedule, so filed by this defendant, were done under protest and it reserved the right in filing such return and schedule to contest the legality of said act; defendant admits that the Arkansas Tax Commission, proceeding under said act, approved March 23, 1911, as aforesaid, did, on the said 20th day of July, 1911, designate and fix the franchise tax against defendant at the said sum of $6,798.26, as shown by Exhibit "D" to the said complaint, but defendant states that said tax was illegal and void for the reasons hereinafter set out, and defendant states that the assessment for said tax against defendant was, by the Arkansas Tax Commission, based on the total mileage of 493.47 in the State of Arkansas, when in fact, this defendant only has 457.1 miles in said State; that the mileage as used by the Arkansas Tax Commission included 24.25 miles of the Pine Bluff, Arkansas River Railway, which said company is a part of the system of said defendant, but is a separate corporation, and also included 16.80 miles of the Paragould Southeastern Railway, which is a part of the system of said defendant, but a separate corpora-

tion, and defendant states that a franchise tax was assessed for the year, 1911, by the said Arkansas Tax Commission against both the Pine Bluff Arkansas River Railway and the Paragould Southeastern Railway, and that the mileage thereon should not have been included against this defendant, and defendant submits that if this Court should hold that said franchise tax so assessed and levied against this defendant is legal, that said tax should only be based on the mileage within the State of Arkansas, against this defendant, of 457.1, which would make a difference in the fran-
32 chise tax so assessed against this defendant of $500.58, making the correct tax against this defendant $6,297.68 instead of $6,798.26.

Defendant further answering, states:

That it is a foreign corporation incorporated under the laws of the State of Missouri and owns and operates a railway line in the States of Illinois, Missouri, Arkansas and Louisiana, and is engaged in interstate commerce in said States and other States, and doing intrastate business in the State of Arkansas; that under a certain act, approved March 13th, 1889, of this State, providing for foreign railroad corporations to own and operate railroad lines in this State, which said act is found and embraced in Sections 6747 and 6748 of Kirby's Digest of the statutes of this State, this defendant complied with said act by filing a certified copy of its articles of incorporation with the Secretary of State of the State of Arkansas, within the time as prescribed by said act, and that it paid the fees therefor, as provided by law, and defendant states that in complying with said act it was authorized to do business in the State of Arkansas as a foreign railroad corporation, and became a common carrier, and is, and was compelled to do intrastate business as such common carrier, and said defendant has, since said time and prior thereto, engaged in the operation of its railway line doing both and interstate and intrastate business.

Defendant, for its further answer to said complaint, states and shows to the court, that the property of this defendant in the State of Arkansas was assessed for the purposes of general taxation for the year 1910, as a property tax at the value of $9,155,965.00,
33 and the tax levied upon the said assessment amounted to $191,713.95, which this defendant paid, as provided by the laws of this State; that under an act of Arkansas, approved May 4th, 1911, entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph, telephone and pipe line companies," the Arkansas Tax Commission was empowered and authorized to assess the property of railroad corporations for general taxation, a copy of said mentioned act being attached hereto marked "Exhibit A"[2], and made a part of this answer. That section two of said act is as follows:

"The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes

the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Defendant states that under said act the said Arkansas Tax Commission did assess all of the property of this defendant within the State of Arkansas for the year 1911 for tax purposes at the value of $11,260,240.00, as a property tax, upon which assessment there have been levied taxes for various purposes, including State, county, school, road and municipal taxes in the sum of $239,388.84 dollars; which said tax this defendant offers to pay, and will pay within the time prescribed by law, and which tax defendant has since the filing of this answer paid and defendant states that the assessment of its

34 said property for the year 1911 by the Arkansas Tax Commission, as aforesaid, included the value of defendant's franchise and its entire property within the State of Arkansas, tangible and intangible; that the alleged franchise tax, designated and fixed by the Arkansas Tax Commission, under the acts mentioned and set out in said complaint, is based upon the proportion of the outstanding capital stock of the defendant, represented by all of its property owned and used in its business, both interstate and intrastate, in the State of Arkansas, and that said tax so levied and fixed is in addition to the tax upon all of defendant's property assessed and levied by the Arkansas Tax Commission, for the year 1911, under Act No. 251 of said State, approved May 4, 1911, aforesaid; that the tax sued for in this case is a tax upon the privilege and right of this defendant to do both an interstate and intrastate business in the State of Arkansas and is a tax upon the interstate business, property and income of the defendant and is a tax placed and imposed upon defendant for the privilege of engaging in interstate commerce and an attempt to regulate interstate commerce and a burden thereon; and that if said act is enforced defendant will be deprived of its right to engage in an interstate business in and through the State of Arkansas. That the act under which said tax is fixed and levied is an attempt to regulate interstate commerce and is contrary to and in violation of that part of section eight, article one of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce between the States, and that all acts of the Arkansas Tax Commission, the Treasurer of State, the Auditor of State, the Secretary of

State and all other officers presuming to act under the afore-

35 said act, are, therefore, null and void.

Defendant, further answering, charges and states that if under the law of this State, franchises are property, that the value of the franchises of the defendant, having taxable value in this State, were considered and included in the assessment of defendant's tangible or physical property for the year 1911 under said Act No. 251, and that to be assessed and required to pay an additonal franchise tax, as such would be, defendant would be required to pay an additional and excessive amount of taxation on its property in said State, which is not required of all other property in the State of Arkansas, and that the imposition of such additional tax is in viola-

tion of Article Sixteen, Section Five of the Constitution of Arkansas, which requires that all property, regardless of ownership shall be taxed Ad Valorem and at the same rate, and is the denial to defendant of the equal protection of the laws, and a taking of its property without due process of law, and is contrary to Article Fourteen, Section One of the Constitution of the United States.

For further answer, defendant says:

That it is a corporation organized under the laws of the State of Missouri, as aforesaid; that it is engaged in the business of a common carrier of passengers, freight and United States mail, and owns and operates lines of railroad in the States of Illinois, Arkansas, Missouri, and Louisiana, as aforesaid. That the object of its incorporation and its principal place of business is a common carrier of such freight, passengers and United States mail in interstate commerce;

36 that the Arkansas Tax Commission has already assessed all the property of this defendant within the State of Arkansas for the year 1911 for tax purposes at the value of $11,260,240.00; that this amount is supposed to represent 50% of the full value of defendant's property within the State of Arkansas, and that on the basis used by said Arkansas Tax Commission on the full value would be $22,520,480.00; that the total earnings of the defendant on both State and interstate business in the State of Arkansas for the six months ending June 30, 1911, was $2,428,573.93; that the revenue from intra-state business in the State of Arkansas was $528,424.28; that the revenue from interstate business in the State of Arkansas was $1,900,149.65; that the intrastate revenue was 22% of the total revenue and in the interstate 78%; that 78% of the value of the company's property fixed by the Arkansas Tax Commission was $17,565,974.40, in the State of Arkansas; that said intrastate business is carried on by defendant as an incident to defendant's interstate business, and for the benefit of the people of the State of Arkansas; that it has paid to the State of Arkansas all lawful taxes and assessments levied against its property in the said State, except the taxes levied and assessed upon its property for the year 1911, which defendant offers to pay, and will pay within the time prescribed by law for the payment of taxes of said year, and which said taxes defendant has since the filing of the answer paid and that it has paid said taxes on the same basis and in the same proportion as has been paid on all other property situated in the State of Arkansas; that the said Arkansas Tax Commission claiming to act under and by virtue of the act of the Arkansas Legislature entitled "An Act for an annual franchise tax on corporations doing

37 business in the State of Arkansas" approved March 23, 1911, as set out and mentioned in said complaint, has undertaken to impose upon this defendant a tax for the privilege of exercising its franchise and engaging in business in the State of Arkansas; that by the terms of the aforesaid act it is provided that there shall be collected annually from each corporation for the privilege of exercising its franchise in said State one-twentieth of one per cent upon the proportion of the outstanding capital stock of the corpora-

tion represented by property owned and used in business transacted in this State.

It is further provided in Section Fifteen of said Act, that if any corporation shall fail to make the report required, or to pay the tax provided by said act, that the Attorney General of this State, or a prosecuting attorney upon request of said Tax Commission, shall bring an action to forfeit and annul the charter of said corporation, and the court may revoke and annul its charter.

It is further provided in Section Twenty of said Act that when any corporation shall have paid the franchise tax prescribed by said act, the said Tax Commission shall issue to it a certificate authorizing it to do business, and that if any corporation shall fail to pay the franchise tax prescribed by said act during the term of said certificate, the said Tax Commission shall cancel said certificate, and said corporation shall forfeit its right to do business in the State.

Defendant alleges that the said Tax Commission has assessed against it a tax upon all of defendant's capital stock employed in the carrying on of an interstate business in and through the
38 State of Arkansas, and that if the aforesaid act is enforced defendant will be deprived of its right to engage in an interstate business in and through the State of Arkansas.

Defendant, therefore, alleges that the said Act of the said State of Arkansas is an attempt to regulate interstate commerce, is a burden thereon, and is contrary to and in violation of that part of Section Eight Article One of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce between the States, and that all acts of the Arkansas Tax Commission, the Treasurer of State, the Auditor of State, the Secretary of State, and all other officers presuming to act under the said act are, therefore, null and void.

Defendant, therefore, says that the tax sued for and the penalty assessed thereon, are illegal and void, and defendant denies that said plaintiff is entitled to recover the said sum of $8,497.82, or any other sum against this defendant under said act.

Having fully answered, defendant prays that it be dismissed with its costs.

BRIDGES & WOOLDRIDGE,
Att'ys for Defendant.

Endorsed and Filed Feb. 8th, 1912. F. J. Ginocchio, Clerk, and May 11th, 1912, J. S. Maloney, Clerk.

39 EXHIBIT "A" 2.

Act 251.

An Act to Provide the Manner of Assessing for Taxation the Property of Railroads, Express, Sleeping Car, Telegraph, Telephone and Pipe Lines Companies.

Section

1. Assessment for taxation of railroads by Arkansas Tax Commission. Ascertainment of par value of all property.
2. Franchise to operate in State. Declared property for purpose of taxation.
3. Telegraph and Telephone companies, pipe lines, sleeping car companies defined; Arkansas Tax Commission to assess for taxation.
4. Contents of statements to be filed by said companies.
5. Form of certificates. Penalty for perjury; commission to resort to other sources for information, if necessary.
6. Total value of said property; rules for determining taxable value.
7. Apportionment of taxes to the several counties of the State.
8. Notice of this Act to be given said companies by Tax Commission.
9. Filed statements by railroads to contain full list of all property.
40 10. Aggregate value and value in detail shown in statement.
11. Statements to be sworn to by some officer of said companies. Penalty for false statement.
12. Arkansas Tax Commission—time of meeting for purposes stated in this Act. Oath of said commission. Examination of statement hereinbefore mentioned for determining valuation of property.
13. Rate of assessment in each to be determined by said commission.
14. Property to be considered real estate named; property considered personal named.
15. Other personal property listed and assessed by assessor in counties where situate, as also the real estate.
16. Penalty for failure to make return of statements and schedule required.
17. Procedure in case of refusal of said company to give statement.
18. Valuation of said property to be recorded in detail. Certification to assessor of value of property located in his respective county.
19. Additional return to be sworn to by railroad; its contents.
20. Return not held conclusive as to value of property.
21. Forms for return to be prescribed by Tax Commission.
22. Laws in conflict repealed. Act in effect from passage.

41 Be it enacted by the General Assembly of the State of Arkansas:

Be it enacted by the people of the State of Arkansas:

SECTION 1. Every railroad chartered, organized or operated under the provisions of chapter 133 of Kirby's Digest, shall for the purposes of taxation be held to be a railroad and shall be assessed for taxation by the Arkansas Tax Commission. Said commission shall ascertain the par value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture, other property, real and personal, owned by each of the railroads or railways of each company or corporation having existence under the laws of this State or incorporated in whole or in part therein, and running through or in this State. Such property shall be listed and assessed with reference to its amounts, kind and value, the first Monday in June of each year.

SECTION 2 The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible.

SECTION 3. For the purposes of assessment and taxation any person or any corporation wherever organized and incorporated, engaged in the business of transmitting to, from or through this State telegraphic messages shall be deemed to be a telegraph com-
42 pany; and persons or corporations wherever organized or incorporated, engaged in the transmitting to, from or through this State telephonic messages shall be deemed to be a telephone company; any person or corporation wherever organized or incorporated, engaged in the business of transmitting oil or gas in pipe lines through or in this State, or owning pipe or pipe lines for such purposes in this State shall be deemed to be a pipe line company; any person or corporation, wherever organized or incorporated, engaged in the business of operating in or through this State, sleeping cars, dining cars, palace or parlor cars shall be deemed to be a sleeping car company; any person or any corporation, wherever organized or incorporated, conveying to, from or through this State, or any part thereof money, merchandise or effects of any kind by express, on contracts with any railroad or steamboat company, or the managers, lessees, agents or receivers thereof, not including railroads or steamboats engaged in the ordinary transportation of merchandise or property in this State, shall be deemed to be an express company. Such companies shall be assessed for taxation by the Arkansas Tax Commission.

SECTION 4. It is made the duty of every sleeping car company, express company, telegraph company, telephone company, pipe line company, wherever organized or incorporated, and carrying on a

business in this State, on the first Monday in July, every year, to make out and file with the Arkansas Tax Commission a statement showing in detail the following:

1st. A certified copy of the articles of incorporation, under
43 which the company is organized and is carrying on business; said copy to be filed but once unless the commission should otherwise direct.

2nd. The amount of capital stock subscribed, whether designated as common or preferred, or by any other description, showing the par value of each share and the market value thereof on the first Monday in June of said year.

3rd. The face value of all bonds, secured by mortgages on the company's property, outstanding and the market or actual value of such bonds.

4th. The total number of miles of railway, within and without this State, over which such sleeping car company runs its cars, or such express company carriers on its business; the total number of miles within and without this State, which any telegraph company employs in the transaction of its business; the total number of miles, within and without this State, which any such telephone company employs in the transaction of its business and the total number of stations within and without this State belonging to such telephone company or in any manner controlled by it; and the total number of miles of pipe lines owned or operated within and without this State by any such pipe line company in the transaction of its business.

5th. The number of miles of railway in this State over which any sleeping car company runs its cars, or over which any such express company carries on its business; the number of miles of line within this State which any such telegraph company employs in the transaction of its business; the number of miles which any such telephone company employs in this State in the transaction of
44 its business and the number of stations owned or controlled by it in this State; and the total number of miles of pipe line owned or operated in this State by any such pipe line company.

SECTION 5. The information provided for in section 4 of this Act shall be made upon such forms as may be prescribed by the Arkansas Tax Commission. The statements contained in such certificates shall be sworn to by the general officer of the corporation, whose service therein makes it his duty to be personally informed with respect to the matters to be included in such certificate. False swearing in making any of the statements required to be set forth in said certificate is hereby declared to be perjury and shall be punished as such. If the commission shall have reason to believe that any statement contained in such certificate filed with it is false in any material matter it is hereby made its duty to procure information about the matters to be contained in such certificate. The commission shall have power and it is hereby made its duty to resort to other sources of information in the event any such corporation shall fail or neglect or refuse to file the certificate aforesaid.

SECTION 6. The aggregate, actual or market value, as the case

may be, of all outstanding stocks and bonds of the corporation, as called for in paragraphs 2 and 3 of section 4 of this Act shall be deemed to be the total value of each such corporation's property within and without this State, and the commission shall fix the total value of the corporation's property at such sum unless it can be shown that the same is not the total value of such property.

45 For the purpose of determining the taxable value in this State of the property of each of the several corporations, the following rules shall be observed:

1st. In case of sleeping car and express companies the commission shall take the same proportion of the aggregate value of the entire property within and without this State as herein determined of such corporations as the number of miles of railway in this State over which such sleeping car company or express company carries on its business bears to the aggregate number of miles of railway within and without this State over which such sleeping car company or express company carries on its business.

2nd. In case of any telegraph company, the tax commission shall take the same proportion of the aggregate value of the entire property within and without this State, as determined by this Act of such corporation, as the number of miles of line employed within this State bears to the number of miles employed by it within and without this State.

3rd. In the case of any telephone company, the commission shall take the total pole miles and total stations (the term "stations," as used by this Act meaning a complete telephone) belonging to the entire system and for purposes of taxation the entire value of the company's property, tangible and intangible, except any real estate whereon exchanges are located, shall be measured by the sum of said totals. The commission shall by such methods as may be deemed practicable, determine what proportion of the total value of the entire system is represented in pole miles and what part

46 is represented in stations. The value of the pole miles in this State shall be held to be the same proportion as the aggregate value of the pole miles of the entire system as the number of pole miles in this State bears to the total pole miles of the entire system, and the value of the stations in this State shall be held to be the same proportion as the aggregate value of the stations of the entire system as the number of stations in this State bears to the total stations in the entire system.

In case of any pipe lines company, the commission shall take the same proportion of the aggregate value of the entire property within and without this State, as determined by this Act, of such corporation as the number of miles employed in this State bears to the total number of miles employed by such company.

The assessment herein provided for shall include the office fixtures, teams, wagons and other apparatus of such companies.

SECTION 7. After the commission shall have determined the aggregate amount to be assessed in this State against the property of any corporation it shall further ascertain the parts of such valuation to be apportioned to the several towns, counties and districts

in which such property is subject to taxation. This shall be done by dividing the aggregate amount fixed as such taxable value in this State by the entire number of miles of railway over which such sleeping car or express company carries on its business, or which such telegraph, telephone or pipe line company employs in carrying on its business; and the value per mile so ascertained
47 shall be used as a basis for distributing the assessment between the several counties, towns and districts. In the case of telephone companies the rule for distributing the values above indicated shall apply to that part of the value represented in pole mileage only. The value represented in stations shall be distributed among the several towns and districts in proportion to the number of stations in each town.

SECTION 8. The Arkansas Tax Commission shall on or before the fifteenth of May of each year, notify each person or corporation owning, operating or constructing a railroad in this State, as defined in section 1 of this Act, and each telegraph, telephone, sleeping car, express and pipe line company, as provided by section 3 of this Act, that the statements and schedules required by section 4, 5 and 9 of this Act are required to be filed by the first day of July next ensuing. Said notice shall be printed or written, and it shall be served by delivering the same to any agent of such railroad or other company, or by depositing the same in any postoffice, addressed to such person or corporation at a point where the general office of such company is established, or at any city or town where such company is transacting business or has a station or office. Failure to receive the notice herein provided shall not be a defense for not making and filing the schedules by this Act required within the time required to be made.

SECTION 9. Each person, company or corporation operating a railroad as defined by section 1 of this Act shall on the first day of July of each year, make out and file with the Arkansas Tax
48 Commission, statements or schedules showing the length of the main line and the length of all side tracks, switches and turn-outs in each county in which the railway may be located and each city or town in said county through or into which the railroad may run; also the depots, section houses, round houses, machine shops, water tanks, coal chutes, and all other buildings and fixtures of every kind used for railroad purposes and the counties, districts and towns in which located; also all materials and stores of every kind, including tools and machinery at machine and repair shops, cross-ties, timbers, rails, and all other kinds of apparatus not coming within the class known as fixtures; also all rolling stock; said statement setting forth distinctly the number of locomotives of all classes, passenger cars, dining cars, mail cars, express cars, coal cars, pay cars, construction and working cars, caboose cars, hand cars, push cars, cattle cars, log cars, and all other kinds of cars belonging to such railroad. Said schedule shall also include all rolling stock not belonging to said company, but leased for its use for a term of not less than six months, it not being intended to tax rolling stock tem-

porarily coming into or passing through this State, but to tax such as is actually owned or leased by the company.

Said schedule shall show the total number of miles of main track of railroad owned and operated by such person, company or corporation in other States and the total number of miles of main track owned and operated in this State. Likewise it shall set forth the number of miles of track on which said rolling stock is used in other States.

49 SECTION 10. Said statements or schedule shall state the actual full and true value in detail of the several items listed, also the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing.

SECTION 11. The statements or schedules shall be sworn to on behalf of the railroad by some officer or employee who is familiar with the facts and who is in a position, because of the character of his employment, to know the truth of the statements to which he is swearing. The affidavit set out in detail in section 6906, Kirby's Digest, shall be appended to each schedule filed by each railroad. False statements made and sworn to in any schedule required by section 9 of this Act shall be deemed to be perjury.

SECTION 12. The Arkansas Tax Commission shall meet the first Monday of July each year for the purpose of assessing the railroad property of the State, and the property of the companies mentioned in section 3 of this Act. Before entering upon the discharge of their duties each member of the commission shall take and subscribe an oath that he will well and truly value and assess the property of the companies and corporations of this Act makes it the duty of the tax commission to assess. Said oath shall be entered at length upon the books used by the commission for recording the

50 assessments of such railroads and corporations. The commission shall proceed to examine the statements and schedules of such railroads and corporations filed with it as herein provided. If such statements are made out in accordance with the provisions of this Act, and in the opinion of the commissioners the valuations fixed by the railroads or corporations is the true and full value in money of the property listed, the commission shall accept said valuation; if not, appraise the property at same. If the commission shall be of the opinion that the valuation fixed in any statement is below the true and full value in money of the property it shall fix the value in each such case at a sum which it believes to be the true and full value in money of the property. In valuing the property of every railroad the commission shall take into consideration the entire railroad, whether all or only part of it is in this State.

SECTION 13. The commission shall determine in the case of each railroad it assesses the value per mile of the main track, the value per mile of the side-track, turn-outs, the value of each building

and the value of the average stock of materials, including machinery and repair shop stores, timber, ties and rails carried the next year preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads in this State the Commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads of this State filed and prepared in accordance with the requirements of this Act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the
51 value per mile of the rolling stock of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles or fraction of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in such county.

SECTION 14. The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several town and school districts through which the railroads run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made.

SECTION 15. All other personal property belonging to a railroad except rolling stock and material, as provided in section 14 of this Act shall be listed and assessed by the assessor in the county where situated, also all real estate, including buildings and structure thereon, other than that used for railroad purposes shall be listed and assessed by the assessor in the county where situated at the same time and in the same manner as real property belonging to individuals is by law required to be listed and assessed.

52 SECTION 16. Any person or corporation operating, owning or constructing a railroad in this State or any other corporation defined in section 3 of this Act, who shall fail to make return of the statements and schedules required by sections 4, 9 and 19 of this Act, to the Arkansas Tax Commission by the first Monday in July in each year, such person or corporation shall forfeit to the State as a penalty not less than one thousand dollars nor more than ten thousand dollars for each offense, to be recovered in a proper form of action in the name of the State of Arkansas, and paid into the State treasury. Upon failure of any person or corporation to make return at the time required, the Arkansas Tax Commission shall notify the Attorney General of such default, and it is made the duty of the Attorney General to institute the necessary legal proceedings to collect such penalty.

SECTION 17. If any person or corporation owning, operating or

constructing any railroad within this State or any of the corporations whose assessment is provided for in section 3 of this Act shall neglect or refuse to give the Arkansas Tax Commission statement and schedules required by this Act by the first Monday in July each year, the said Arkansas Tax Commission shall forthwith proceed with the assistance of the assessors in the several counties in which such railroad or other property of such other company is located, if such assistance shall be required, to ascertain the necessary facts in connection with the location and value of the property belonging to the defaulting railroad or other company. In
53 the discharge of its duty the commission shall have power to summon before it any person as a witness and to have produced the books and papers of such railroads or other company, to administer oaths and to examine any person summoned before it touching any matter necessary to enable the commission to arrive at a just and correct value of and description of the defaulting railroad's or other company's property. The commission shall have power to direct its writs or summons to any sheriff of any county of this State, and it shall be the duty of such sheriff to execute any and all processes to him directed by the commission. Any person called before said commission to testify shall be guilty of perjury if he testifies falsely. The commission having ascertained in the manner herein indicated the description and values of the railroads' and other company's property in the county the same shall be certified out to the respective county assessors in the manner prescribed in section 18 of this Act.

SECTION 18. When the Arkansas Tax Commission shall have ascertained the value of the property of any railroad as herein provided or of the companies and corporations whose assessment is provided for in section 3 of this Act, the valuation shall be entered in detail in a record to be kept by the commission for that purpose. Before the first day of September of each year it shall be the duty of the commission to certify out through its chairman and secretary to the assessor of each county in which any railroad is located, or other company or corporation may be in said county and in the several districts and towns in said county. The assessor shall enter upon the proper records the assessments so certified to him.
54 SECTION 19. In addition to the returns and schedules by this Act required to be filed with the Arkansas Tax Commission by the several railroads, it shall be the duty of every railroad to file with said commission at the same time the other returns by this Act prescribed are filed, a sworn return wherein shall be set forth:

1st. The name and principal office of the railroad and the State under whose laws it is incorporated.

2nd. The total capital stock of every kind whatsoever, whether common or preferred, outstanding. The market, if no market, the actual value of all such stock.

3rd. The total outstanding bonded indebtedness against the railroad. The market, if no market, the actual value of the bonds representing such bonded indebtedness.

4th. The total gross earnings, operating expenses and net earnings of the road for the year next preceding the first Monday of June of the year for which the return is made.

5th. If the railroad operates in other States, the total gross earnings, operating expenses and net earnings for that part of the railroad located in Arkansas, including interstate as well as intrastate business.

SECTION —. The return of the railroad companies and other corporations whose assessment is provided for by section 3 of this Act, shall not be held to be conclusive as to the value of the property returned. But the Arkansas Tax Commission may make such assessment of such property as it may deem just and equitable. The commission shall have the power to require the attendance of any president, secretary, receiver, accounting officer, servant or agent
55 of any corporation whose property this Act makes it the duty of the commission to assess; and any such officer who shall refuse to attend before the commission when it is his duty, or he is required to do so, or refuses to submit to the inspection of said commission any books or papers of such corporation in his possession, custody or control, or shall refuse to answer such questions as shall be put to him by the commission or its order touching the business, property or money and credits, and the value thereof, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined any sum not exceeding five hundred dollars and costs. Any president, secretary, receiver, accounting officer, servant or agent of any company who shall knowingly make any false answer to any question put to him by the commission or by its order touching the business, property, money and credits, and the value thereof, of said company, shall be guilty of perjury.

SECTION 21. The returns prescribed in sections 3 and 9 of this Act shall be made upon such forms as the Arkansas Tax Commission shall prescribe.

SECTION 22. All laws and parts of laws in conflict with this Act be and the same are hereby repealed and this Act being necessary for the immediate preservation of the public health, peace and safety shall take effect and be in force from and after its passage.

Approved May 4, 1911.

56 In the Pulaski Circuit Court, Second Division.

14695.

STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General,
Plaintiff,
vs.
ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY, Defendant.

Demurrer to Answer.

Comes now the State of Arkansas on relation of Hal L. Norwood, Attorney General, Plaintiff herein, and by permission of the Court

files herein her demurrer to the answer heretofore filed by the defendant, the St. Louis & Southwestern Railway Company; said demurrer being both general and special, as follows, to-wit:

I.

Plaintiff demurs to Defendant's answer because the same does not state facts sufficient to constitute a legal defense, counter claim, cross-complaint or recoupment to Plaintiff's cause of action herein.

II.

Plaintiff separately and severally demurs to each and every paragraph of said answer because no paragraph thereof taken separately or in connection with any other paragraph or paragraphs states matters sufficient to constitute a legal defense, counter claim, cross-complaint or recoupment to Plaintiff's cause of action herein.

57

III.

Plaintiff demurs to said answer, and to each and every paragraph thereof, because it appears from the facts alleged therein that the Act of the General Assembly of 1911, under which Plaintiff's cause of action accrued, is valid in every respect and in no wise conflicts with, or is repugnant to, any part of the Constitution of the State of Arkansas or of the Constitution of the United States.

IV.

Plaintiff demurs to that part of Defendant's answer which undertakes to reduce the amount of the recovery asked herein, because (*a*) Said attempt so to reduce the amount sued for herein is an effort to attack collaterally the findings of a legally constituted Board and Commission of the State of Arkansas, to-wit: The Arkansas Tax Commission, and (*b*) because that part of said answer which undertakes to cut down the amount of taxes due, is, in effect, a suit against the State of Arkansas and cannot be maintained.

Wherefore, premises considered, Plaintiff prays that this demurrer be sustained and that upon a failure of Defendant further to plead, that she have judgment against it for the amount sued for herein with interest, costs and other proper relief.

HAL L. NORWOOD,
Attorney General.
WM. H. RECTOR,
Assistant Attorney General.

Indorsed and Filed March 16, 1912. F. J. Ginocchio, Clerk.
" " " May 11, 1912. J. S. Maloney, Clerk.

Record Entries from Circuit Court.

58 In the Circuit Court, 2nd Division.

14695.

STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RY. CO., Defendant.

Comes the plaintiff, by Hal L. Norwood, Attorney General, and by leave of court files herein its demurrer to defendant's answer.
Filed March 16th, 1912.

14695.

STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RY. CO., Defendant.

Comes the plaintiff, by Hal L. Norwood, Attorney General, and announces to the Court, that by consent and agreement of the parties hereto, this cause may be transferred to the Pulaski Chancery Court; and the Court being well and sufficiently advised, doth find that this is a proper cause for said court, doth order that the said cause be transferred; and the Clerk of this court is hereby directed to transcribe and certify all the record entries made herein, and transmit same, together with all the original pleadings filed herein.
Filed May 4th, 1912.

59 *Record Entries.*

In Chancery Court.

14695.

STATE OF ARKANSAS ex Rel. H. L. NORWOOD, Plaintiff,
vs.
ST. LOUIS S. W. RY. COMPANY, Defendant.

On this day comes the clerk of the Pulaski Circuit Court second division and files herein the transcript of the record entries of said court together with the following named pleadings; the complaint, the answer, the demurrer to the answer.

60 In the Pulaski Chancery Court.

14695.

STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Plaintiff,

vs.

THE ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY, Defendant.

Decree.

Now on this day, the same being a regular day of the April Term of this Court, comes the State of Arkansas, by Hal L. Norwood, Attorney General, and by Bradshaw, Rhoton & Helm, Special Counsel, heretofore appointed by the Governor to assist the Attorney General in this case, as by law in such cases made and provided; and comes also the defendant herein, the St. Louis & Southwestern Railway Company, by its counsel, W. T. Wooldridge, Esqr., and Roy Britton, Esqr., and this cause coming on to be heard on the plaintiff's complaint, defendant's answer and plaintiff's demurrer to the defendant's answer, and the Court being fully and sufficiently advised in the premises, doth sustain the said demurrer to the said answer, to which ruling and holding of the Court in sustaining said demurrer, the defendant at the time excepted and refused to plead further, and elected to stand upon its answer, whereupon

It is therefore, by this Court, considered, ordered, adjudged and decreed that plaintiff's demurrer to the answer of defendant be, and the same is hereby, in all respects, sustained, to which action
61 of the Court in sustaining said demurrer, the defendant excepts.

It is further considered, ordered and adjudged and decreed, the defendant having failed and refused to plead further, that the plaintiff, the State of Arkansas, have and recover of and from the defendant, the six thousand, seven hundred and ninety-eight & 26-100 Dollars, the amount of franchise tax sued for herein, and the further sum of one thousand, six hundred and ninety-nine and 56-100 Dollars, the penalty accruing to the State on account of the failure of said defendant to pay said franchise tax, on or before the 1st day of August, 1911, and the further sum of four hundred and one and 16-100 Dollars, the same being interest upon the aforesaid sum of six thousand, seven hundred and ninety-eight and 26-100 Dollars, the franchise tax aforesaid, to which judgment, decree and order of the Court, and the order and judgment of the Court in sustaining the demurrer to defendant's answer and in giving judgment for $401.10 as interest on said franchise tax. The defendant at the time excepts, and prays an appeal to the Supreme Court of Arkansas, which is granted.

62 The Court doth further find and fix the compensation of the services of Special Counsel herein, Bradshaw, Rhoton & Helm, at twenty (20%) per cent of the amount recovered, and doth direct the Attorney General to deduct said twenty (20%)

per cent from the amount of this judgment and decree, and to pay the same over to the said Bradshaw, Rhoton & Helm, as costs of litigation.

——— ———,

7-25-'12.

O. K.
J. E. M.

O. K. as to form.
W. T. W.

O. K. as to both form and substance.
W. H. RECTOR.

63 In the Pulaski Chancery Court.

14695.

STATE OF ARKANSAS ex Rel., Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Appeal Bond.

Whereas, the defendant, St. Louis Southwestern Railway Company, has taken an appeal from the judgment of the Pulaski Chancery Court, rendered at its April term, 1912, against defendant in favor of the plaintiff for the sum of Eight Thousand Eight Hundred and Ninety-eight & 92-100 ($8,898.92) Dollars, with cost, and the defendant desires to supersede said judgment, now the St. Louis Southwestern Railway Company, and Charles McKee and Gordon N. Peay, as sureties, hereby covenant with the said plaintiff that the said defendant will pay to the plaintiff all costs and damages that may be adjudged against the defendant on the appeal, or in the event of the failure of the defendant to prosecute said appeal to a final judgment in the Supreme Court, or if said appeal shall for any cause be dismissed, that said sureties shall pay to the plaintiff all costs and damages, and shall perform the judgment of the court appealed from; also, that said appeal shall be prosecuted without delay; also, that it will satisfy and perform the judgment or order appealed from in case it should be affirmed and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding
64 in amount or value the original judgment or order.

Witness our hands this the 7th day of August, 1912.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY.
CHAS. McKEE.
GORDON N. PEAY.

Approved:
J. S. MALONEY, *Clerk.*

Indorsed and Filed August 20th, 1912.
J. S. MALONEY, *Clerk.*

65 *Fee Bill, Chancery Court.*

14695.

STATE OF ARKANSAS ex Rel. H. L. NORWOOD, Attorney General,
Plaintiff,
vs.
ST. LOUIS S. W. RY. COMPANY, Defendant.

Statement of Costs.

Sheriff's Fees	$.60
Clerk's Fees	13.10
Witness Fees	.....
Plaintiff's Depositions	.....
Defendant's Depositions	.....
Cost of Transcript	23.90
Total	$37.60

Attest:
J. S. MALONEY, *Clerk.*

66 *Certificate.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, J. S. Maloney, Clerk of Pulaski Chancery Court, do hereby certify that the annexed and foregoing pages of typewritten matter contains a true, accurate and complete transcript of all the pleadings, papers, files and entries of proceedings in the action named in the caption; as hath appeared by comparing the same with the original thereof on file, and of record in my office.

In testimony whereof, I hereunto subscribe my name, as such clerk, and affix hereto the seal of said court, at my office in the City of Little Rock, in the County of Pulaski, this the 2nd day of September, A. D. 1912.

[SEAL.]

J. S. MALONEY,
Clerk of Pulaski Chancery Court.
By F. A. GARRETT, *D. C.*

67 *Filing in Supreme Court.*

Pulaski Ch'y. John E. Martineau, J. $11.50.

No. 2349.

ST. L. S. W. RY. CO.
vs.
STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General.

Transcript.
Filed Octo. 10, 1912.

P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

68 *Record Entries, Supreme Court.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1912, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 13th of January, 1913, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Appellee.

Appeal from Pulaski Chancery Court.

This cause being regularly called come the parties thereto by their solicitors, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

69 *Decree.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered that at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday in November, A. D. 1912, at the Courthouse in the City of Little Rock, the following proceedings were had, to-wit: On the 27th day of January, 1913, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
THE STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Appellee.

Appeal from Pulaski Chancery Court.

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellant all her costs in this court in this cause expended, and have execution thereof.

70 *Statement of Case.*

In the Supreme Court of Arkansas, Jan'y 27, 1913.

No. 108.

ST. L. S. W. RY. CO.

v.

STATE ex Rel. HAL L. NORWOOD, Attorney General.

Statement by the Court.

The Attorney General proceeding under Act # 112 entitl "An Act for an annual franchise tax on corporations doing bu ness in the State of Arkansas" (Acts of Arkansas, 1911, page 6 brought this suit to recover the franchise tax levied against the Louis Southwestern Railway Company by the Arkansas Tax Co mission under the provisions of said Act for the year 1911.

The complaint alleges that the amount of taxes is $6,798.2 together with a penalty of twenty-five per cent. amounting $1,699.56, making a total of $8,497.82. The defendant, St. Lou Southwestern Railway Company, is a railway corporation orga ized under the laws of the State of Missouri. It is engaged in t business of a common carrier of freight and passengers and ow and operates lines of railroad in the States of Arkansas, Missou Illinois and Louisiana. Act # 112 requires each corporation d ing business in the State to make a report to the Arkansas Ta Commission showing, among other things, the total amount of i capital stock authorized, subscribed, issued, outstanding and pai up, the market value of the same, and the value of the property owned and used by the corporation in the State, and the value o the property owned and used by it outside of the State. Section of the Act is as follows:

"Upon the filing of the report provided for in Sections
71 4 and 5 of this Act, the commission or assessor, as the case may be, from the facts thus reported and any other facts coming to its or his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in this State on or before July 20, and shall report the same to the Auditor of the State, who shall charge and certify to the Treasurer of the State on or before August 1, for collection as herein provided, annually from such company, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State."

The defendant under protest made the report required by the Act. This report, among other things, showed that the total

amount of its authorized capital stock was $55,000,000.00, and the total amount of issued and outstanding stock was $36,249,750.00. The Arkansas Tax Commission found the proportion of outstanding capital stock represented by property owned and used by the defendant in business transacted in the State of Arkansas for the year 1911 to be $13,596,520.00, on which the franchise tax amounted to $6,798.26. On May 4th, 1911, the Legislature of the State of Arkansas passed Act # 251 entitled "An Act to provide the manner for assessing for taxation the property of railway, express, sleeping car, telegraph, telephone and pipe line companies." Acts of Ark. 1911, page 233. This Act provides that the property of railroad corporations and the others named in
72 the title should be assessed by the Arkansas Tax Commission. Section 1 of the Act provides that said commission shall ascertain the par value of all property, tangible and intangible, including the franchise (except the right to be a corporation), railway tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture, other property real and personal owned by each of the railroad corporations having existence under the laws of this State and running through and into this State. Section 2 is as follows:

"The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchise shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Proceeding under this Act the Arkansas Tax Commission assessed the property of the defendant within the State of Arkansas for the year 1911 in the sum of $11,260,244.00, on which defendant paid taxes for various purposes including State, county, school, road and municipal taxes to the amount of $239,388.84. The answer of the defendant set forth these facts and challenged the validity of Act 112 on the grounds that it amounted to double taxation, and that it is a regulation of interstate commerce and a burden thereon. The Attorney General filed a demurrer to the answer of the defendant which was sustained by the court.
73 From the decree entered the defendant has duly prosecuted an appeal to this Court.

Opinion.

HART, *J.* (after stating the facts):

Counsel for defendant contend that it has paid its taxes under Act # 251 of Acts of 1911, providing for the taxation of its property in the State of Arkansas, and that the imposition of a franchise tax under Act # 112 of Acts of 1911 is invalid, but we can not agree with them in their contention. The constitution of the State

of Arkansas provides how foreign corporations may be authorized to do business in the State in the following language:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property." Art. 12, Sec. 11 of the Constitution of 1874.

Under the head of "finance and taxation," our constitution, Art. 16, Sec. 5, is as follows:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform
74 throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

Art. 16, Sec. 7, is as follows:

"The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party."

Our court has held that a corporation owes its existence to the State and the right to enjoy this privilege is a subject of taxation, and that upon the power of the legislature to impose such a tax there exists no restriction in our constitution. In the case of a foreign corporation the tax or license is paid for the privilege of exercising its corporate powers in the State. Baker v. State, 44 Ark. 138, and cases cited. In the case of Standard Underground Cable Company v. Attorney General, 46 N. J. Eq. 270, 19 Am. St. Rep. 394, the question as to whether a certain license tax imposed upon the corporation was a tax upon corporate property was involved. The corporation insisted that the tax was a violation of that provision of the constitution of New Jersey which provides "that property shall be assessed for taxation under general laws and by uniform rules according to its true value." The court said:

"The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal qual-
75 ity of a license or franchise tax. Evening Journal Association v. State Board of Assessors, 47 N. J. L. 36; 54 Am. St. Rep. 114; Cooley on Taxation, 2nd Ed. 379, and cases cited."

In the passage of the act in question no doubt the legislature had in mind the fact that the right or privilege to be or exist as a

corporation, although a matter of value to the stockholders of the corporation, is not an asset of the corporation and transferrable as such, and that its value cannot under ordinary rules be ascertained for the purpose of taxation as property, but since it is a privilege or right granted by the State a franchise tax may be imposed upon this right or privilege for the purpose of raising revenue. We think it plain then under our constitution and decisions that the act in question is valid unless it be held a burden upon interstate commerce.

It is earnestly insisted by counsel for defendant that the tax in question, although levied in the guise of a franchise or excise tax, is in reality a taxation of interstate commerce. They rely upon the decision of the Supreme Court of the United States cited below and other decisions of a like character to sustain their position. Western Union Tel. Co. v. State of Kansas, 216 U. S., 1; Ludwig v. Western Union Tel. Co., 216 U. S., 146; Oklahoma v. The Wells-Fargo & Co., 223 U. S. 298; U. S. Express Co. v. Minn. 233 U. S. 335.

It is settled by these decisions that State laws may not burden interstate commerce, but the right of the State to tax property although it is used in interstate commerce is equally
76 well settled by them. In the case of the U. S. Express Co. v. Minn., the court said:

"The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. supra, wherein the possible differences between the decisions in Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. supra, and Maine v. Grand Trunk Ry. Co. 142 U. S. supra, were commented upon and explained. Mr. Justice Holmes, speaking for the court, said:

'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' Cable Co. v. Adams, 155 U. S. 688, 697. See New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at
77 the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it can.' In that case the statute of Texas was condemned, because it appeared to the

court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent, or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the State court and the argument on behalf of the State that another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax or in any way helped by the words "equal to." Upon like reasoning the statute of Oklahoma was condemned in the case of Oklahoma v. Wells, Fargo & Co., decided today, ante, p. 298."

The statute under consideration in that case was upheld because the court said that it was a part of a system long in force in Minnesota, passed under the authority of the State constitution, and that it was intended to afford a means of valuing property of express companies within the State. Continuing the court said:

"While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law."

In the case at bar the gross receipts from all sources of
78 the railway company have not been used as a means for ascertaining the value of the property in the State. By the express provision of Act #251 it was enacted for the purpose of providing the manner for assessing for taxation the property of railroad companies the right to be or exist as a corporation was expressly excluded from the items which go to make up the value of the property of the corporation. As we have already seen, the right or privilege to be or exist as a corporation is the subject of taxation and this right or privilege is not considered in fixing the value of the property of corporations under Act 251, the general tax act. Our State has fixed a franchise tax based solely "upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this State." The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of Ludwig v. Western Union Tel. Co. supra, and the Western Union Tel. Co. v. Kansas, supra, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so. It will be noted in the Ludwig case, the statute requires a foreign corporation engaged in interstate commerce to pay as a license tax for doing intrastate business a given amount on its capital stock whether employed within the State or elsewhere, and the court held that on the authority of the Kansas case, the statute in question was unconstitutional and

void because it directly burdened interstate commerce and
79 imposed a tax on property beyond the jurisdiction of the State. So in the Kansas case the State demanded in the form of a fee or tax a given per cent of all the capital stock of foreign corporations, without any discrimination between the capital

represented in business and property of the telegraph company outside of the State and the capital representing such of its business and property as was wholly local to the State, and the court held the act for every practical purpose was in essence not simply a tax for the privilege of doing local business in the State but was a burden and tax on the company's interstate business and on its property located or used outside of the State, the court said:

"To hold otherwise, is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits."

In the case at bar our State has not fixed a franchise tax based upon a per cent of the entire capital stock but has based it solely "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." In the case of Wells, Fargo & Co.'s Express v. Crawford County, 63 Ark. 576, at page 589, the court said:

"The legislature has the power to classify property for
80 the purpose of taxation and to provide for the valuation of different classes by different methods. Constitution of 1874, article 15, section 5; St. L. I. M. & S. Ry. Co. v. Worthen, 52 Ark. 529. * * * Without such classification the property of such companies could not be assessed as a unit, and the Legislature has the power to require that the value of such property be ascertained by considering it in that way. It has been many times held, both by the Supreme Court of the United States and by State appellate courts, that the property of railroads, telegraph, sleeping car and express companies engaged in interstate commerce may be valued as a unit for the purpose of taxation, and that a proportion of the whole, fairly and properly ascertained, may be taxed by the State in which it is situated. Sanford v. Poe, 17 Supreme Court Rep. 305; Western Union Tel. Co. v. Taggart, 163 U. S. 1; Pittsburg Ry. Co. v. Backus, 154 U. S. 421; Pullman Car Co. v. Pennsylvania, 141 U. S. 18; W. U. Tel. Co. v. Attorney General of Mass. 125 U. S. 530; State v. Jones, 51 Ohio St. 492."

We think the act in question is valid and comes squarely within the principles announced in the case of Maine v. Grand Trunk Ry. Co. 142 U. S. 217, where the court made the following ruling:

"A State statute which requires every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchises therein to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within
81 and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, does not conflict

with the Constitution of the United States and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the State, is one within the power of the State to levy."

The decree will be affirmed.

82 *Certificate.*

SUPREME COURT OF ARKANSAS, *ss:*

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the St. Louis Southwestern Railway Company, a corporation, Plaintiff v. The State of Arkansas, ex rel. Hal L. Norwood, Attorney General, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this February 20, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

83 In the Supreme Court of Arkansas.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Appellee.

Assignment of Errors.

Now comes the appellant, St. Louis Southwestern Railway Company, and files herewith its petition for writ of error, and says that there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

First. The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the appellant, St. Louis Southwestern Railway Company, on the ground of its being repugnant to that part of Section Eight, Article One, of the Constitution of the United States, vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Second. The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the appellant, St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section One, of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

84 Third. The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section One of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty or property without due process of law."

Fourth. The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid, and in not holding that the tax imposed upon appellant under said Act was a tax for the privilege of exercising appellant's franchise and engaging in business in the State of Arkansas. The validity of said Act was denied and drawn in question by the St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section Eight, Article One of the Constitution of the United States, vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Fifth. The Supreme Court of Arkansas erred in confirming the action of the Pulaski County Chancery Court in rendering a judgment and decree against the appellant, St. Louis Southwestern Railway Company.

Sixth. The Supreme Court of Arkansas erred in not reversing the judgment and decree of the Pulaski County Chancery Court.

For which errors, the appellant, St. Louis Southwestern Railway Co. prays that the said judgment and decree of the Supreme Court of the State of Arkansas, dated January 27th, 1913, be re-
85 versed, and a judgment and decree rendered in favor of the appellant company, and for costs.

S. H. WEST,
BRIDGES & WOOLDRIDGE,
Attorneys for St. Louis Southwestern Railway Company.

Filed Feb'y 20th, 1913.

P. D. ENGLISH, *Clerk.*
By J. H. CAMPBELL, *D. C.*

86 In the Supreme Court of Arkansas.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment and decree against it in the above entitled case, the appellant, St. Louis Southwestern Railway Company, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

S. H. WEST,
BRIDGES & WOOLDRIDGE,
Attorneys for Appellant.

STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by St. Louis Southwestern Railway Company to the State of Arkansas, in the sum of Fifteen thousand ($15,000) Dollars; such bond when approved to act as a supersedeas.

Dated February 19th, 1913.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed Feb'y 20, 1913.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

87 In the Supreme Court of Arkansas.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
STATE OF ARKANSAS ex Rel. HAL L. NORWOOD, Attorney General, Appellee.

Bond.

Know all men by these presents, that we the St. Louis Southwestern Railway Company as principal and W D. Hearn and Gordon N. Peay, as sureties, are held and firmly bound unto the State of Arkansas, in the sum of Fifteen Thousand Dollars, to be paid to the said State, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

87½

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By BRIDGES & WOOLDRIDGE, *Attorneys.*
W. D. HEARN.
GORDON N. PEAY.

Approved:
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed Feb'y 20, 1913.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

88 *Writ of Error.*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the State of Arkansas, ex rel. Hal L. Norwood, Attorney General, and the St. Louis Southwestern Railway Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, the said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemptions specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said St. Louis Southwestern Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

Sealed with our seals, and dated this 20th day of February, 1913. ing the same to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof
89 that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 19th day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the United States of America, the one hundred and thirty-seventh.

SID. B. REDDING,
Clerk U. S. District Court for the Eastern District of Arkansas,
By W. P. FEILD, JR., *D. C.*

Allowed:

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Feb'y 20, 1913.
P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

90 *Certificate of Lodgment.*

SUPREME COURT,
State of Arkansas, ss:

I, P. D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 19, 1913, in the matter of the St. Louis Southwestern Railway Company, a corporation, versus The State of Arkansas, ex rel. Hal L. Norwood, Attorney General,

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth, one for *each* defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 20 day of February, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

91 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the St. Louis Southwestern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arkansas, this 20th day of February, 1913.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *Feb'y 20th,* 1913.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WM. L. MOOSE,
Attorney for the State of Arkansas.
LEWIS RHOTON,
Att'y for Appellee.

Filed Feb'y 20, 1913.
P. D. ENGLISH, *Cl'k,*
By J. H. CAMPBELL, *D. C.*

92 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this February 20, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

Costs of Suit.

Chancery Court, Pulaski County	$13.70
Supreme Court of Arkansas	50.40
To making transcript for the Supreme Court of the United States	32.00

Cost paid by Plaintiff in Error.

P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

Endorsed on cover: No. 23,566. Arkansas Supreme Court. Term No. 470. St. Louis Southwestern Railway Company, plaintiff in error, vs. The State of Arkansas ex rel. Hal L. Norwood, Attorney General. Filed February 27th, 1913. File No. 23,566.

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. [illegible] 119

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE STATE OF ARKANSAS, on the relation of [illegible], Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION OF PLAINTIFF IN ERROR FOR ADVANCE.

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 470.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS, ex rel, etc., DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE.

Comes the St. Louis Southwestern Railway Company, plaintiff in error, by its attorneys, and moves the Court to advance this cause as provided by the rules of this Court, and set it for hearing at such early date as may to the Court seem proper, and for cause states:

That this case is of large public interest in that it involves the right of a State to levy a franchise tax against a non-resident common carrier engaged in interstate commerce, computed on the proportion of its capital stock represented by its property and business in Arkansas.

This suit was begun by the State of Arkansas against the plaintiff in error, a non-resident interstate carrier, for the sum of $6,792.26, and penalty of 25% thereon, for a franchise tax for the year 1911 assessed and levied under Act No. 112, and entitled, "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," and approved March 23rd, 1911, and an amendment of said Act approved May 26th, 1911, both of which acts are set out and copied in full in the record in this case; that said act is a revenue measure and this suit is for the purpose of collecting the tax and penalty assessed under said act; that under Section 12 of said act it is provided that a penalty of 25% shall be assessed and collected upon the

amount of the tax levied, if the tax is not paid as provided by said act. Judgment was rendered against the plaintiff in error by the lower court for $8,497.82, which included the tax levied and the penalty thereon, which judgment was on appeal affirmed by the State Supreme Court of Arkansas. The plaintiff in error is contesting the validity of said act upon the ground that the same is as to plaintiff in error contrary to the Constitution of the United States for the reasons set up in its answer.

A similar suit was filed against plaintiff in error in the Chancery Court of Pulaski County, Arkansas, to collect the franchise tax assessed and levied under said act against it for the year 1912, which by agreement is to abide the decision of this Court in this case, and similar suits will be brought against plaintiff in error to collect the tax assessed and levied for each successive year and for the heavy penalty under said act until its validity is determined by this Court, and should this Court hold that said act is valid, the plaintiff in error will have to

pay the heavy penalty provided by said act for the non-payment of the annual franchise tax assessed and levied against it.

Wherefore, the plaintiff in error prays that this cause be advanced and set for submission at an early day to be fixed by this Honorable Court.

SAMUEL H. WEST,

EDWARD A. HAID,

FRANK G. BRIDGES,

WILLIAM T. WOOLDRIDGE,

Attorneys for Plaintiff in Error.

And now come William L. Moose, Attorney General for the State of Arkansas, and Bradshaw, Rhoton & Helm, attorneys for the defendant in error, and waive the service of a copy of the above motion to advance and join the attorneys for plaintiff in error in its motion to advance this cause and ask that said cause be advanced as prayed in said motion.

Signed this the 31st day of December, 1913.

Wm L Moose, Atty Gen'l
Bradshaw Rhoton & Helm
By Lewis R Rhoton
Lewis R Rhoton.

Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. ~~1[illegible]~~ 119

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY----------*Plaintiff in Error.*

vs.

THE STATE OF ARKANSAS, ex rel, etc.,
----------*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

ABSTRACT AND BRIEF OF THE PLAINTIFF IN ERROR

SAMUEL H. WEST,
EDWARD A. HAID,
FRANK G. BRIDGES,
WILLIAM T. WOOLDRIDGE,
Attorneys for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. 470

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.....*Plaintiff in Error.*

vs.

THE STATE OF ARKANSAS, ex rel, etc.,
.....*Defendant in Error*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

ABSTRACT AND BRIEF OF THE PLAINTIFF IN ERROR

ABSTRACT

This cause was originally begun November 16, 1911, in the Pulaski Circuit Court, and by consent of the parties was transferred May 4, 1912, to the Pulaski Chancery Court. (Printed Record 29).

THE PLEADINGS.

The complaint, omitting the formal part, is as follows:

That the St. Louis Southwestern Railway Company, the above named defendant, is a corporation duly organized and existing under and by virtue of the laws of the

State of Missouri, having its domicile at the city of S Louis, in said State; that it owns, operates and maintain a system of railroads in this and other States; and that i was at and prior to the institution of this suit engaged i doing business as a common carrier in this State; carry ing for hire both passengers and freight between station in this State and between stations in this State and station in other States; said defendant being engaged in both in strastate and interstate commerce; that said corporation the defendant aforesaid, was at, and prior to the institu tion of this suit, and is now, exercising its corporate func tions under authority and by virtue of the laws of thi State, and is engaged in doing a corporate business within the State of Arkansas.

That on August 1st, 1911, said defendant was liable to the State of Arkansas for the payment of a franchise tax levied against it under and by virtue of an Act of the General Assembly of the State of Arkansas entitled "An Act for an annual franchise tax on corporations doing busi ness in the State of Arkansas," approved March 23, 1911, and an Act of the General Assembly of the State of Arkansas, entitled "An Act to Amend an Act of the Gen eral Assembly entitled "An Act for an Annual Franchise Tax on Corporations doing business in the State of Arkan sas, approved March 23, 1911," approved May 26th, 1911. Copy of each of said above mentioned Acts being hereto attached, marked Exhibits "A" and "B" respectively, and made a part hereof.

That said defendant proceeding under and by virtue of said Acts aforesaid did, on the 1st day of July, 1911, file

with the Arkansas Tax Commission the return and schedule required by said Act Approved March 23rd, 1911, a copy of said return and schedule being hereto attached marked Exhibit "C", and made a part hereof.

That said Arkansas Tax Commission proceeding under the authority vested in it by the laws of the State of Arkansas, and having under consideration the proper franchise tax due and payable by the above mentioned defendant for the privilege of doing a corporate business in this State, did, on the 20th day of July, 1911, designate and fix the said franchise tax at the sum of $6,798.26; that a true and correct copy of the records of said Arkansas Tax Commission showing its proceedings in the premises is hereto attached, marked Exhibit "D" and made a part hereof.

That on the 20th day of July, 1911, the Arkansas Tax Commission certified to the auditor of the State the amount of franchise tax due and payable by this defendant at the said sum of $6,798.26; that said certificate was filed in the office of the Auditor of State on the 21st day of July, 1911.

That on the 25th day of July, 1911, the Hon. Jno. R. Jobe, Auditor of the State of Arkansas, certified to the State Treasurer the amount of franchise tax due and payable by the above named defendant at the above named sum of $6,798.26.

That under and by virtue of the Acts of the General Assembly aforesaid, copies of which are attached hereto, it then and there became the duty of this defendant on and

after the 1st day of August, to pay to the State Treasurer the said sum of $6,798.26 as a franchise tax fixed, designated and certified against it for the privilege of doing a corporate business within the State of Arkansas.

That said defendant was in due time notified by the Treasurer of the State of the amount by it due on account of its franchise tax, but that it failed, neglected and refused to pay said sum of $6,798.26, or any part thereof, and that it continued to fail, neglect and refuse to pay said sum or any part thereof, and that said failure, neglect and refusal upon its part, is willful and without just cause.

That on the 15th day of September, 1911, Hon. Jno. W. Crockett, Treasurer of the State of Arkansas, certified to the Auditor of the State the fact that the said defendant had failed, neglected and refused to pay the franchise tax aforesaid, or any part thereof, and that said defendant was a deliquent tax payer.

Whereupon, on the said 15th day of September, 1911, the Hon. Jno. R. Jobe, Auditor of State, proceeding under and by virtue of the power and authority of the Acts of the General Assembly aforesaid, certified to the Attorney General of the State of Arkansas the fact that this defendant had failed, neglected and refused to pay said franchise tax amounting to the sum of $6,798.26 or any part thereof, and extended against said defendant the penalty prescribed and required by the Acts of the General Assembly aforesaid of twenty-five percentum, which said penalty amounts to $1,699.56.

That the Attorney General preceeding under the Acts

of the General Assembly aforesaid has demanded of said defendant the payment of said tax and penalty amounting in the aggregate to the sum of $8,497.82, which amount is now due and payable by said defendant, on account of its franchise tax aforesaid and the penalty accrued against it for its failure to pay said franchise tax on or before the 10th day of August, 1911.

That said defendant has failed, neglected and refused to pay said franchise tax, or any part thereof, and has failed, neglected and refused to pay said penalty or any part thereof; that said defendant has failed, neglected and refused to pay the said sum of $8,497.82 tax and penalty, or any part thereof and at this date fails, neglects and refuses to pay said tax and penalty, or any part thereof although demand has been made upon it therefor.

Wherefore, premises considered, plaintiff prays for judgment against said defendant in the sum of $8,497.82, with interest from the 15th day of September, 1911, for its costs in this behalf laid out and expended and for all other proper relief. (Printed Record 1-3).

EXHIBIT "C".

TO THE ARKANSAS TAX COMMISSION:

At the request of the Secretary of State of the State of Arkansas, pursuant to the requirements of Act No. 112, approved March 23rd, 1911, the St. Louis Southwestern Railway Company makes to you the following report as required by Sections Four and Five of said Act.

SCHEDULE.

1st (a) The name of the corporation: St. Louis Southwestern Railway Company.

(b) Under the laws of what State or country organized; Organized under the laws of the State of Missouri.

2nd Location of its principle office; St. Louis, Mo.

3rd (a) President; Edwin Gould, New York, N. Y.
(b) Secretary; Arthur J. Trussell, New York, N. Y.
(c) Treasurer; G. K. Warner, St. Louis, Mo.
(d) Members of the Board of Directors;

Edwin Gould,	New York, N. Y.
F. H. Britton,	St. Louis, Mo.
Wm. H. Taylor,	New York, N. Y.
R. M. Galloway,	New York, N. Y.
E. T. Jeffery,	New York, N. Y.
Howard Gould,	New York, N. Y.
Murray Carleton,	St. Louis, Mo.
Winslow S. Pierce,	New York, N. Y.
Tom Randolph,	St. Louis, Mo.

4th The date of the annual meeting of the officers; First Tuesday in October.

5th (a) The amount of the authorized capital stock; $55,000,000.
(b) The par value of each share; $100.00.

6th (a) The amount of the capital stock subscribed;
(b) The amount of the capital stock issued and outstanding; $36,249,750.00.
(c) The amount of the capital stock paid up; $36,249,750.00.
The market value of same;
Common, $16,356,100.00.
$31.50 per share—$5,152,171.50.
Preferred, $10,893,650.00.
$68.50 per share—$13,627,150.25.

Total $18,779,321.75

7th (a) The nature and kind of business in which the company is engaged; State and interestate transportation of passengers and property.
(b) Its place of business both within and without the State of Arkansas; St. Louis, Missouri.

and various stations along its lines in Arkansas.

8th (a) The name and location of its office or offices in the State of Arkansas; at various stations along its lines in the State of Arkansas.

(b) The names and addresses of officers or agents of the coroporation in charge of its business within the State of Arkansas; the business of the Company is transacted by various offices and numerous agents in the State, the names and addresses of whom will be of no service to the Tax Commission.

9th (a) Value of property owned and used by the Company in the State of Arkansas; $19,887,387.79.

(b) Where situated; See Tax Return.

(c) Value of the property owned and used by the Company outside of the State of Arkansas, $37,353,566.46.

10th The change or changes, if any, in the above particulars made since last annual report; None.

The values given in this report cover and include the property of the St. Louis Southwestern Railway Company, which owns all of the stock and bonds of the St. Louis Southwestern Railway Company of Texas, and on which are bottomed the stocks and bonds of the St. Louis Southwestern Railway Company; the total value of the property in the State of Arkansas and elsewhere, $57,240,954.25, is the market value of the capital stock and bonds of the St. Louis Southwestern Railway Company on June 5th, 1911, covering 1,315.65 miles of railroad operated by the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas.

In making this report the St. Louis Southwestern Railway Company does not admit the validity or legality of Act No. 112 of the State of Arkansas, approved March 23, 1911, but gives the information herein contained out of a desire to avoid the appearance of not complying with the reason-

able regulations of the State of Arkansas, and the St. Louis Southwestern Railway Company denies that this report is necessary or essential as a condition precedent to its continuing to transact business in the State of Arkansas, both State and interstate, and it reserves the right to contest the validiy of the Act referred to or any taxes to be levied thereunder and by appropriate means to resist the enforcement thereof.

STATE OF MISSOURI,
CITY OF ST. LOUIS.

I, W. A. Conaway, Tax Agent of the St. Louis Southwestern Railway Company, do solemnly swear that the foregoing statement as now rendered by me on behalf of the St. Louis Southwestern Railway Company, is a true, full and correct statement of facts, in answer to the above queries, made at the close of business on the 5th day of June, 1911, so help me God.

W. A. CONAWAY,
Tax Agent.

Subscibed and sworn to before me, this the 30th day of June, 1911.

[SEAL] MARGARET LALLY,
Notary Public.

My commission expires January 11th, 1913.

INDORSEMENT.

This Company has in Arkansas a total of 493.47 miles (including lines owned and controlled). According to this statement it owns and operates all told 1,315.65 miles of road. The Arkansas property is easily worth mile for mile as much as the property elsewhere. The total capitalization of the road is $36,240,750.

It is more than fair to the road to assign to Arkansas that part of its capitalization represented by 493.47 miles.

Therefore 1,315.65: 493.47 miles, $36,249,750:
xEquals
2| $13,596,522

$ 6,798.26

Foreign Franchise Tax Notice.
St. Louis Southwestern Railroad Company.

Filed, July 1st, 1911.

A. C. MARTINEAU,
Secretary.

July 18th, entered. (Printed Record 3-6).

EXHIBIT "D".

Franchise Tax of Corporation fixed by the Tax Commission,
Office of Tax Commission.

Little Rock, Ark., Old State House, July 20, 1911.

The Arkansas Tax Commission, all members being present, has under consideration all the Franchise Tax Reports that have been filed with the Tax Commission, up to and including this date, of Domestic and Foreign Corporations having a capital stock, of foreign and domestic corporations having no capital stock, of foreign and domestic insurance companies having an authorized capital stock, and of building and loan associations doing business in this State.

After an examination of all franchise tax reports that have been filed with the Tax Commission up to and including this date, of foreign corporations having a capital stock and doing business in this State on the 1st day of July, 1911, the Tax Commission does hereby fix the proportion of the outstanding capital stock represented by property owned and used in business transacted in this State, and the Franchise Tax for the year 1911, of the said several foreign corporations to be such sums as are shown, under the proper headings and opposite the name of the corporation, on pages one (1) to one hunred (100) inclusive, of that department designated, "Annual Franchise Tax Record, 1911-12, Arkansas," of this office.

In fixing the subscribed or issued and outstanding capital stock, employed or used in this State, and the amount of Franchise Tax to be paid by each of the corporations or companies referred to above as having filed their reports before July 21st, 1911, the Tax Commission has accepted their reports as true and determined the amount of capital stock employed or used in this State and Franchise Tax from said reports, except the following named corporations.

In fixing the capital stock and franchise tax of the following corporations, the Commission after having duly considered and investigated the reports of said corporations, found the same to be incomplete in some particulars, and after obtaining the information so lacking and noting the same, in many instances on the back of the report of said coporatios, had found the capital stock and franchise tax as is indicated by record book mentioned above, and also as follows:

FOREIGN CORPORATIONS.

Name of corporations----------	Subscribed capital stock.	Franchise Tax.
St. Louis Southwestern Ry. Co.,	$13,596,520.00	$6,798.26

The Commission also directs its Secretary to certify, on this date, a copy of the companies and corporations, with the amount of their subscribed or issued and outstanding capital stock and the franchise tax of each, as set out in the first paragraph, to the Auditor of State, Jno. R. Jobe.

L. M. BURGE, *Chairman.*
DAVID A. GATES,
I. E. BROWN,
State Tax Commissioners.

A. C. MARTINEAU,
Secretary of Ark. Tax. Com. (Printed Record 6-7).

Exhibit "A" is a copy of Act No. 112 of the Thirty-eight General Assembly of the State of Arkansas entitled, "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," approved March 23, 1911. (Printed Record 7).

Sections One, Two and Three relate to corporations

organized under the laws of the State of Arkansas. The provisions relating to foreign corporations are as follows:

Section 4. Each foreign corporation for profit, doing business in this State, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the Arkansas Tax Commission annually, or before July 1, and if such tax commission shall have been abolished by law, then the assessor of the county in which the principal place of business of such corporation in this State shall be.

Section 5. Such report shall contain:

1. The name or the corporation and under the laws of what State or county organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, the amount of capital stock paid up, and the market value of same.

7. The nature and kind of business in which the company is engaged, and its place or places of business, both within and without this State.

8. The name and location of its office or offices, in this State, and the names and addresses of the officers or

agents of the corporation in charge of its business in this State.

9. The value of the property owned and used by the company in this State, where situated and the value of the property owned and used outside of this State.

10. The change or changes, if any, in the above particulars made since the last annual report.

Section 6. Upon the filing of the report provided for in Sections 4 and 5 of this Act, the commission or assessor, as the case may be, from the facts thus reported and any other facts coming to its or his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in this State on or before July 20, and shall report the same to the Auditor of the State, who shall charge and certify to the Treasurer of the State on or before August 1, for collection as herein provided, annually from such company, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State one-twentieth of one per cent each year thereafter upon the proportion of the outstandisg capital stock of the corporation represented by property owned and used in business transacted in this State. (Printed Record 7-9).

Sections Seven, Eight and Nine relate to domestic and foreign corporations having no capital stock and to insurance companies. (Printed Record 9).

Section 10. Upon the filing of the report and the payment of the fee provided for in sections 1 to 9 of this Act, inclusive, to the Treasurer of State, the Auditor of State shall make out and deliver to the corporation paying, a certificate of the compliance of such corporation with the said

sections of this Act, and the payment of the annual fee provided for herein. The Auditor of State shall make a report to the commission, or if the commission be abolished by law, then to the Secretary of State, of the annual fee so collected.

Section 11. The Secretary of State shall prepare and keep a correct list of all corporations subject to the provisions of sections 1 to 9, inclusive, of this Act, and engaged in business within the State, and shall on July 1 each year certify a copy of this list to the Arkansas Tax Commission, or to the Secretary of State if the commission be abolished, and shall monthly thereafter file with the commission certified report showing all corporations, the increase or decrease of the capital stock, or the dissolution of existing corporations and such other information as the Commission or Secretary of State, as case may be, may require. For the purpose of obtaining other information, the Secretary of State or the commission shall have access to the records of the offices of the county clerks of the State.

Section 12. The taxes provided for by this Act shall be due and payable on or before August 1, each year. All taxes shall be by the Treasurer of State credited to the general revenue fund. If any corporation refuses to pay on or before the 10th day of August, the taxes assessed against it, the Treasurer of State shall certify a list of such corporations so delinquent to the Auditor of State, who shall add to the tax due, a penalty of twenty-five per cent thereon, and forthwith certify the same to the Attorney-General for collection. The Attorney-General shall proceed forthwith to collect the same, and the amount so collected shall be paid into the State Treasury and credited to the general revenue fund. Suits for collection of such tax may be brought

in the name of the State, or in any other county in which such corporation has its domicile, and if a foreign corporation, in the county of its principal place of business.

Section 13. On or before September 10, each year, the Arkansas Tax Commission, or the various tax assessors, as the case may be, shall file with the Secretary of State a written statement containing the name of each company which has complied with the provisions of this Act during the year next preceeding.

Section 14. The taxes and penalties required to be paid by the provisions of this Act shall be the first lien on all property of the corporation, whether such property is employed by the coropration in the prosecution of its business, or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors or stockholders thereof.

Section 15. If a corporation organized under the laws of Arkansas or any foreign country authorized to do business in this State for profit, and which is required to file the record and pay the tax prescribed in this Act, fails or neglects to make such report, or to pay such tax for thirty days after the expiration of the time limited by this Act, and such default is wilful, and intentional, the Attorney-General or the prosecuting attorney of the district, on the request of the tax commission, or the assessor of the county, as the case may be, shall bring an action in the Circuit Court of Pulaski County, or any other county in this State in which the domicile or principal place of business of such corporation is located, to forfeit and annul the charter of such corporation. If the court is satisfied that such default is wilful and intentional it shall revoke and annul such charter.

Section 16. Any county clerk or assessor, upon the

request of the Secretary of State or the Arkansas Tax Commission shall furnish such information as is shown by the records of his office concerning such corporations located within his county and subject to the provisions of this Act. The commission, or assessor of the county, as the case may be, for determining this amount of tax due for such corporation, may investigate and determine the facts shown in the proportion of the authorized capital stock of the company represented by its property and business in this State.

Section 17. The Secretary of State shall cause to be prepared suitable blanks for the carrying out of the purpose of this Act and shall furnish such blanks to each corporation or association subject thereto.

Section 18. All insurance companies, building and loan associations, and corporations, the fees of which are fixed in lump sums by this Act, and all corporations which employ all of its property and all of its outstanding capital stock in this State, or which will report and pay the fees on all of its outstanding capital stock, whether employed in this State or not, shall not be required to set out in reports required by this Act, the value of its property within this State or without this State.

Section 19. If any corporation subject to the provisions of this Act fails or refuses to make answers to the questions contained in such reports required to be filed by them, then said Commission may require delinquent corporations, their officers, agents, or employees to furnish information concerning their capital stock which is necessary in determining the amount of the tax to be paid by them, and for that purpose said commission may summon witnesses to appear and give testimony and to produce records, books, papers, docu-

ments and all other information of any kind or character required, relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpoena issued by any member of the commission, or the secretary thereof, in the name of the commission directed to any sheriff of Arkansas and returnable to the commission, which commission shall be served in like manner to the same effect, and under similar conditions, as if issued out of the Circuit Court. The commission is also authorized to cause the deposition of witnesses residing within or without the State, or absent therefrom, to be taken upon notice to the interested party, if any, in like manner that depositions of witnesses are taken in civil actions in the Circuit Court in any matter which the commisson may have authority to investigate and determine. Oaths to witnesses in any matter under the investigation or consideration of the commission may be administered by the secretary or any member thereof. In case any witness shall fail to obey any summons or appear before said commission, or shall refuse to testify or answer any material question, or to produce records, books, papers or documents, when requested so to do; such failure or refusal shall be reported to the Attorney-General or the prosecuting attorney of the district in which such corporation has its principal place of business, who shall thereupon proceed in the proper course to compel obedience to any summons or proper order of the commission or to punish witness for any improper neglect or refusal. Any witness who shall knowingly or wilfully give a false answer to any question propounded in any such sworn examination, where the fact inquired of is within his knowl-

edge, shall be deemed guilty of perjury. It shall be unlawful for any member of the Arkansas Tax Commission or for any officer or employee of said commission, or for any other officer or employee of the State to divulge or make known in any manner whatever not provided by law to any person, any information obtained by him in the discharge of his official duties; or to divulge or make known in any manner not provided by law any document revised, evidence taken, or report made under this Act. Any offense against the foregoing provisions shall be a misdemeaor, and shall be punished by a fine of not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months.

Section 20. When any corporation shall have paid the franchise tax prescribed by this Act, the State Tax Commission, or Secretary of State, if the tax commission be abolished, shall issue to it a certificate authorizing it to do business in this State for the term of five years from the date thereof upon condition that it pay annually the franchise tax prescribed by this Act, and such certificate shall be evidence in all the courts of this State of the right of such corporation to do business in this State during the term of such certificate.

In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act.

Section 21. Act No. 260 of the Acts of the General Assembly of 1909, and Act No. 443 of the Acts of the

General Assembly 1907, and all other laws and parts of laws in conflict therewith are hereby repealed and this Act shall take effect and be in force from and after its passage. (Printed Record 9-12).

Exhibit "B" is a copy of Act 313 of the Thirty-eighth General Assembly of the State of Arkansas (approved May 26, 1911), entitled, "An Act to amend an Act, entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas." (Approved March 23, 1911).

Section One amends Section Nine of Act No. 112, relating to the insurance companies.

Section Two amends Section Twenty-one of Act No. 112, as follows:

Section 21. That Act No. 260 of the Acts of the General Assembly of 1909 and Act No. 443 of the Acts of the General Assembly of 1907 and all other laws and parts of laws in conflict with this Act are hereby repealed and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage. (Printed Record 13).

Defendant in due time filed its answer, which, omitting the formal parts, is as follows:

The defendant, St. Louis Southwestern Railway Company, for its answer to the complaint herein, says:

It admits that it is a railway corporation incorporated under the laws of the State of Missouri and having its domicile at the City of St. Louis, in said State, as alleged, it admits that it owns and operates and maintains a railroad in this and other States, and that it is a common carrier carrying for hire both passengers and freight in this and other States; that it is engaged in both intrastate and interstate commerce, as alleged; it admits that it is doing an intrastate business in the State of Arkansas under the laws of said State.

Defendant denies that on August 1, 1911, or since that time, it was liable to the State of Arkansas for the payment of a franchise tax levied against it under the act mentioned in said complaint, approved March 23rd, 1911, and the amendment thereto, approved May 26th, 1911, as set out in said complaint aforesaid; defendant states that said Acts as to this defendant are illegal, null and void for the reasons hereinafter stated and set out.

Defendant admits that it filed on the 1st day of July, 1911, with the Arkansas Tax Commission the return and schedule required by said Act, approved March 23, 1911, but defendant says that said return and schedule, so filed by this defendant, was done under protest and it reserved the right in filing such return and schedule to contest the legality of said Act; defendant admits that the Arkansas Tax Commission, proceeding under said act, approved March 23, 1911, as aforesaid, did, on the said 20th day of July, 1911, designate and fix the franchise tax against defendant at the said sum of $6,798.26, as shown by Ex-

hibit "D" to the said complaint, but defendant states that said tax was illegal and void for the reasons hereinafter set out, and defendant states that the assessment of said tax against defendant was, by the Arkansas Tax Commission based on the total mileage of 493.47 in the State of Arkansas, when in fact this defendant only has 457.1 miles in said State; that the mileage as used by the Arkansas Tax Commission included 24.25 miles of the Pine Bluff, Arkansas River Railway, which said company is a part of the system of said defendant, but is a separate corporation, and also included 16.80 miles of the Paragould Southeastern Railway, which is a part of the system of said defendant, but a separate corporation, and defendant states that a franchise tax was assessed for the year 1911, by the said Arkansas Tax Commission against both the Pine Bluff Arkansas River Railway and the Paragould Southeastern Railway, and that the mileage thereon should not have been included against this defendant, and defendant submits that if this Court should hold that said franchise tax so assessed and levied against this defendant is legal, that said tax should only be based on the mileage within the State of Arkansas, against this defendant of 457.1, which would make a difference in the franchise tax so assessed against this defendant of $500.58, making the correct tax against this defendant $6,207.68 instead of $6,798.26.

Defendant further answering, states:

That it is a foreign railroad corporation incorporated under the laws of the State of Missouri and owns and operates a railway line in the States of Illinois, Missouri, Arkansas and Louisiana, and is engaged in interstate com-

merce in said States and other States, and doing intrastate business in the State of Arkansas; that under a certain act, approved March 13th, 1889, of this State, providing for foreign railroad corporations to own and operate railroad lines in this State, which said Act is found and embraced in *Sections 6747 and 6748 of Kirby's Digest* of the Statutes of this State, this defendant complied with said Act by filing a certified copy of its articles of incorporation with the Secretary of the State of Arkansas, within the time as prescribed by said Act and that it paid the fees therefor, as provided by law, and defendant states that in complying with said Act it was authorized to do business in the State of Arkansas as a foreign railroad corporation, and became a common carrier, and is, and was compelled to do intrastate business as such common carrier, and said defendant has, since said time and prior thereto, engaged in the operation of its railway line doing both an interstate and intrastate business.

Defendant, for its further answer to said complaint, states and shows to the Court, that the property of this defendant in the State of Arkansas was assessed for the purposes of general taxation for the year 1910, as a property tax at the value of $9,155,965, and the tax levied upon the said assessment amounted to $191,713.95, which this defendant paid, as provided by the laws of this State; that under an act of Arkansas, approved May 4th, 1911, entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph, telephone and pipe line companies," the Arkansas Tax Commission was empowered and authorized to assess the

property of railroad corporations for general taxation, a copy of said mentioned Act being attached hereto marked "Exhibit A 2," and made a part of this answer. That section two of said Act is as follows:

"The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assesssment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Defendant states that under said Act the said Arkansas Tax Commission did assess all of the property of this defendant within the State of Arkansas for the year 1911 for tax purposes at the value of $11,260,240.00, as a property tax, upon which assessment there have been levied taxes for various purposes including State, county, school, road and municipal taxes in the sum of $239,388.-84; which said tax this defendant offers to pay, and will pay within the time prescribed by law, and which tax defendant has since the filing of this answer paid, and defendant states that the assessment of its said property for the year 1911 by the Arkansas Tax Commission, as aforesaid, included the value of defendant's franchise and its entire property with in the State of Arkansas, tangible and intangible; that the alleged franchise tax, designated and fixed by the Arkansas Tax Commission, under the Acts mentioned and set out in said complaint, is based upon the proportion of the outstanding capital stock of the defendant, represented by all of its property owned and used in its business, both interstate and instrastate, in the State of

Arkansas, and that said tax so levied and fixed is in addition to the tax upon all of defendant's property assessed and levied by the Arkansas Tax Commission, for the year 1911, under Act No. 251 of said State, approved May 4, 1911, as aforesaid; that the tax sued for in this case is a tax upon the privilege and right of this defendant to do both an interstate and intrastate business in the State of Arkansas and is a tax upon the intrastate business, property and income of the defendant and is a tax placed and imposed upon the defendant for the privilege of engaging in interstate commerce and an attempt to regulate interstate commerce and a burden thereon; and that if said act is enforced defendant will be deprived of its rights to engage in an interstate business in and through the State of Arkansas. That the Act under which said tax is fixed and levied is an attempt to regulate interstate commerce and is contrary to and in violation of that part of section 8, article one of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce between the States, and that all acts of the Arkansas Tax Commission, the Treasurer of State, the Auditor of State, the Secretary of State and all other officers presuming to act under the aforesaid Act, are, therefore, null and void.

Defendant, further answering, charges and states that if under the law of this State, franchises are property, that the value of the franchises of the defendant, having taxable value in this State, were considered and included in the assessment of defendant's tangible or physical property for the year 1911 under said Act No. 251, and that to be

assessed and required to pay an additional franchise tax as such would be, defendant would be required to pay an additional and excessive amount of taxation on its property in said State, which is not required of all other property in the State of Arkansas, and that the imposition of such additional tax is in violation of Article Sixteen, Section Five of the Constitution of Arkansas, which requires that all property, regardless of ownership, shall be taxed *ad valorem* and at the same rate, and is the denial to defendant of the equal protection of the laws, and a taking of its property without due process of law, and is contrary to Article Fourteen, Section One of the Constitution of the United States.

For furher answer, defendant says:

That it is a corporation organized under the laws of the State of Missouri, as aforesaid; that it is engaged in the business of a common carrier of passengers, freight and United States mail, and owns and operates lines of railroad in the State of Illinois, Arkansas, Missouri and Louisiana, as aforesaid. That the object of its incorporation and its principal business is a common carrier of such freight, passengers and United States mail in interstate commerce; that the Arkansas Tax Commission has already assessed all the property of this defendant within the State of Arkansas for the year 1911 for tax purposes at the value of $11,260,240.00; that this amount is supposed to represent 50 per cent of the full value of defendant's property within the State of Arkansas, and that on the basis used by said Arkansas Tax Commission on the full value would be $22,250,480.00; that the total earnings of the defend-

ant on both State and interstate business in the State of Arkansas for the six months ending June 30, 1911, was $2,428,573.93; that the revenue from intrastate business in the State of Arkansas was $528,424.28; that the revenue from interstate business in the State of Arkansas was $1,900,149.65; that the intrastate revenue was 22 per cent of the total revenue and the interstate 78 per cent; that 78 per cent of the value of the company's property fixed by the Arkansas Tax Commission was $17,565,074.00 in the State of Arkansas; that said intrastate business is carried on by the defendant as an incident to defendant's interstate business and for the benefit of the people, of the State of Arkansas; that it has paid to the State of Arkansas all lawful taxes and assessments levied against its property in the said State, except the taxes levied and assessed upon its property for the year 1911, which defendant offers to pay, and will pay within the time prescribed by law for the payment of the taxes of said year, and which said taxes defendant has since the filing of the answer paid and that it has paid taxes on the same basis and in the same proportion as has been paid on all other property situated in the State of Arkansas; that the said Arkansas Tax Commission claiming to act under and by virtue of the Act of the Arkansas Legislature entitled, "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," approved March 23, 1911, as set out and mentioned in said complaint, has undertaken to impose upon this defendant a tax for the privilege of exercising its franchise and engaging in business in the State of Arkansas; that by the terms of the aforesaid Act it is provided that there shall be collected annually from each corporation for

the privilege of exercising its franchise in said State one-twentieth of one per cent upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State.

It is further provided in Section Fifteen of said Act, that if any corporation shall fail to make the report required, or to pay the tax provided by said Act, that the Attorney-General of this State, or a prosecuting atorney upon request of said Tax Commission, shall bring an action to forfeit and annul the charter of said corporation, and the Court may revoke and annul its charter.

It is further provided in Section Twenty of said Act that when any corporation shall have paid the franchise tax prescribed by said Act, the said Tax Commission shall issue to it a certificate authorizing it to do business, and that if any corporation shall fail to pay the franchise tax prescribed by said Act during the term of said certificate, the said Tax Commission shall cancel said certificate, and said corporation shall forfeit its right to do business in the State.

Defendant alleges that the said Tax Commission has assessed against it a tax upon all of defendant's capital stock employed in the carrying on of an interstate business in and through the State of Arkansas, and that if the aforesaid act is enforced defendant will be deprived of its right to engage in an interstate business in and through the State of Arkansas.

Defendant therefore, alleges that the said Act of the said State of Arkansas is an attempt to regulate interstate

commerce, is a burden thereon, and is contrary to and in violation of that part of Section Eight, Article One of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce between the states, and that all acts of the Arkansas Tax Commission, the Treasurer of State, the Auditor of State, the Secretary of State, and all other officers presuming to act under the said act are, therefore, null and void.

Defendant, therefore, says that the tax sued for and the penalty assessed thereon, are illegal and void, and defendant denies that said plaintiff is entitled to recover the said sum of $8,497.82, or any other sum against this defendant under said act. (Printed Record 14-18).

EXHIBIT "A" 2.

Act No. 251 (approved May 4, 1911), entitled, "An Act to provide the manner of assessing for taxation the property of Railroads, Express, Sleeping Car, Telegraph, Telephone and Pipe Line Companies." (Printed Record 19).

Section 1. Every railroad chartered, organized or operated under the provisions of Chapter 133 of Kirby's Digest, shall for purposes of taxation be held to be a railroad and shall be assessed for taxation by the Arkansas Tax Commission. Said commission shall ascertain the par value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture, other property, real and personal, owned by each of the railroads or railways of

each company or corporation having existence under the laws of this state or incorporated in whole or in part therein, and running through or in this State. Such property shall be listed and assessed with reference to its amounts, kind and value, the first Monday in June of each year.

Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph, and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valueing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible. (Printed Record 20).

Section Three, Four, Five, Six and Seven relate to the assessment of telegraph, telephone, pipe line, sleeping car and express companies. (Printed Record 20-22).

Section 8. The Arkansas Tax Commission shall on or before the fifteenth day of May of each year, notify each person or corporation owning, operating or constructing a railroad in this State, as defined in Section 1 of this Act, and each telegraph, telephone, sleeping car, express and pipe line company, as provided by Section 3 of this Act, that the statements and schedules required by Sections 4, 5 and 9 of this Act are required to be filed by the first day of July next ensuing. Said notice shall be printed or written, and it shall be served by delivering the same to any agent of such railroad or other company, or by depositing the same in any postoffice, addressed to such person or

corporation at a point where the general office of such company is established, or at any city or town where such company is transacting business or has a station or office. Failure to receive the notice herein provided shall not be a defense for not making and filing the schedules by this Act required within the time required to be made.

Section 9. Each person, company or corporation operating a railroad as defined by Section 1 of this Act, shall on the first day of July of each year, make out and file with the Arkansas Tax Commission, statements or schedules showing the length of the main line and the length of all side tracks, switches and turnouts in each county in which the railroad may be located and each city or town in said county through or into which the railroad may run; also the depots, section houses, round houses, machine shops, water tanks, coal chutes, and all other buildings and fixtures of every kind used for railroad purposes and the counties, districts and towns in which located; also materials and stores of every kind, including tools and machinery at machine and repair shops, crossties, timbers, rails, and all other kind of apparatus not coming within the class known as fixtures; also all rolling stock; said statement setting forth distinctly the number of locomotives of all classes, passenger cars, dining cars, mail cars, express cars, coal cars, pay cars, construction and working cars, caboose cars, hand cars push cars, cattle cars, log cars, and all other kinds of cars belonging to such railroad. Said schedule shall also include all rolling stock not belonging to said company, but leased for its use for a term of not more than six months, it not being intended to tax rolling

stock temporarily coming into or passing through this State, but to tax such as is actually owned or leased by the company.

Said schedules shall show the total number of miles of main track of railroad owned and operated by such person, company or corporation in other States and the total number of miles of main track owned and operated in this State. Likewise it shall set forth the number of miles of track on which said rolling stock is used in other States.

Section 10. Said statements or schedule shall state the actual full and true value in detail of the several items listed, also the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing.

Section 11. The statements or schedules shall be sworn to on behalf of the railroad by some officer or employee who is familiar with the facts and who is in a position, because of the character of his employment, to know the truth of the statements to which he is swearing. The affidavit set out in detail in *Section 6906, Kirby's Digest*, shall be appended to each schedule filed by each railroad. False statements made and sworn to in any schedule required by Section 9 of this act, shall be deemed to be perjury.

Section 12. The Arkansas Tax Commission shall

meet the first Monday of July each year for the purpose of assessing the railroad property of the State, and the property of the companies mentioned in Section 3 of this Act. Before entering upon the discharge of their duties each member of the commission shall take and subscribe an oath that he will well and truly value and assess the property of the companies and corporations of this Act makes it the duty of the tax commission to assess. Said oath shall be entered upon the books used by the commission for recording the assessments of such railroads and corporations. The commission shall proceed to examine the statements and schedules of such railroads and corporations filed with it as herein provided. If such statements are made out in accordance with the provisions of this Act, and in the opinion of the commissioners the valuations fixed by the railroads or corporations is the true and full value in money of the property listed, the commission shall accept said valuation and appraise the property at same. If the commission shall be of the opinion that the valuation fixed in any statement is below the true and full value in money of the property it shall fix the value in each case at a sum which it believes to be the true and full value in money of the property. In valuing the property of every railroad the commission shall take into consideration the entire railroad, whether all or only part of it is in this State.

Section 13. The commission shall determine in the case of each railroad it assesses the value per mile of the main track, the value per mile of the side-track, turn-outs, the value of each building and the value of the average stock of materials, including machinery and repair shop

stores, timber, ties and rails carried the next year preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads in this State the Commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads in this State filed and prepared in accordance with the requirements of this Act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the value per mile of the rolling stock of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles or fraction of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in such county.

Section 14. The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several town and school districts through which the railroads run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made.

Section 15. All other personal property belonging to a railroad except rolling stock and material, as provided in section 14 of this Act shall be listed and assessed by the assessor in the county where situated, also all real estate, including buildings and structures thereon, other than that used for railroad purposes shall be listed and assessed by the assessor in the county where situated at the same time and in the same manner as real property belonging to individuals is by law required to be listed and assessed.

Section 16. Any person or corporation operating, owning or constructing a railroad in this State or any other corporation defined in Section 3 of this Act, who shall fail to make return of the statements and schedules required by Section 4, 9 and 19 of this Act, to the Arkansas Tax Commission by the first Monday in July in each year, which person or corporation shall forfeit to the State as a penalty not less than one thousand dollars nor more than ten thousand dollars for each offense, to be recovered in a proper form of action in the name of the State of Arkansas, and paid into the state treasury. Upon failure of any person or corporation to make return at the time required, the Arkansas Tax Commission shall notify the Attorney-General of such default, and it is made the duty of the Attorney-General to institute the necessary legal proceedings to collect such penalty.

Section 17. If any person or corporation owning, operating or constructing any railroad within this State or any of the corporations whose assessment is provided for in Section 3 of this Act shall neglect or refuse to give the Arkansas Tax Commission statements and schedules re-

quired by this Act by the first Monday in July each year, the said Arkansas Tax Commission shall forthwith proceed with the assistance of the assessors in the several counties in which such railroad or the property of such other company is located, if such assistance shall be required, to ascertain the necessary facts in connection with the location and value of the property belonging to the defaulting railroad or other company. In the discharge of its duty the commission shall have power to summon before it any person as a witness and to have produced the books and papers of such railroads or other company, to administer oaths and to examine any person summoned before it touching any matter necessary to enable the commission to arrive at a just and correct value of and description of the defaulting railroads or other company's property. The commission shall have power to direct its writs or summons to any sheriff of any county of this State, and it shall be the duty of such sheriff to execute any and all processes to him directed by the commission. Any person called before said commission to testify shall be guilty of perjury if he testifies falsely. The commission having ascertained in the matter herein indicated the description and values of the railroads' and other Company's property in the county the same shall be certified out to the respective county assessors in the matter prescribed in Section 18 of this Act.

Section 18. When the Arkansas Tax Commission shall have ascertained the value of the property of any railroad as herein provided or of the companies and corporations whose assessments is provided for in Section 3 of this Act, the valuation shall be entered in detail in a record to

be kept by the commission for that purpose. Before the first day of September of each year it shall be the duty of the commission to certify out through its chairman and secretary to the assessor of each county in which any railroad is located, or other company or corporation may be doing business, so much of said value as is located in said county and in the several districts and towns in said county. The assessor shall enter upon the proper records the assessments so certified to him.

Section 19. In addition to the returns and schedules by this Act required to be filed with the Arkansas Tax Commission by the Several railroads, it shall be the duty of every railroad to file with said commission at the same time the other returns by this Act prescribed are filed, a sworn return wherein shall be set forth:

1st. The name and principal office of the railroad and the State under whose laws it is incorporated.

2nd. The total capital stock of every kind whatsoever, whether common or preferred, outstanding. The market, and if no market, the actual value of all such stock.

3rd. The total outstanding bonded indebtedness against the railroad. The market, and if no market, the actual value of the bonds representing such bonded indebtedness.

4th. The total gross earning, operating expenses and net earnings of the road for the year next preceding the first Monday of June of the year for which the return is made.

5th. If the railroad operates in other states, the total gross earnings, operating expenses and net earnings for

that part of the railroad located in Arkansas, including interstate as well as instrastate business.

Section 20. The return of the railroad companies and other corporations whose assessment is provided for by Section 3 of this Act, shall not be held to be conclusive as to the value of the property returned. But the Arkansas Tax Commission may make such assessment of such property as it may deem just and equitable. The commission shall have the power to require the attendance of any president, secretary, receiver, accounting officer, servant or agent of any corporation whose property this Act makes it the duty of the commission to assess; and any such officer who shall refuse to attend before the commission when it is his duty, or he is required to do so, or refuses to sumbit to the inspection of said commission any books or papers of such corporation in his possession, custody or control, or shall refuse to answer such questions as shall be put to him by the commission or its order touching the business, property or money and credits, and the value thereof, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined any sum not exceeding five hundred dollars and costs. Any president, secretary, receiver, accounting officer, servant or agent of any company who shall knowingly make any false answer to any question put to him by the commission or by its order touching the business, property, money and credits, and the value thereof, of said company shall be guilty of perjury.

Section 21. The returns prescribed in Sections 3 and 9 of this Act shall be made upon such forms as the Arkan-

sas Tax Commission shall prescribe.

Section 22. All laws and parts of laws in conflict with this Act be and the same are hereby repealed and this Act being necessary for the immediate preservation of the public health, peace and safety shall take effect and be in force from and after its passage. (Printed Record 23-27).

In due time the plaintiff demurred to defendant's answer, said demurrer, omitting the formal parts, being as follows:

Comes now the State of Arkansas on relation of Hal L. Norwood, Attorney General, Plaintiff herein, and by permission of the Court files herein her demurrer to the answer heretofore filed by the defendant, the St. Louis & Southwestern Railway Company; said demurrer being both general and special, as follows, to-wit:

I.

Plaintiff demurs to Defendant's answer because the same does not state facts sufficient to constitute a legal defense, counter claim, cross-complaint or recoupment to Plaintiff's cause of action herein.

II.

Plaintiff separately and severally demurs to each and every paragraph of said answer because no paragraph thereof taken separately or in connection with any other paragraph or paragraphs states matters sufficient to constitute a legal defense, counter claims, cross-complaint or recoupment to Plaintiff's cause of action herein.

III.

Plaintiff demurs to said answer, and to each and every paragraph thereof, because it appears from the facts alleged therein that the Act of the General Assembly of 1911, under which Plaintiff's cause of action accrued, is valid in every respect and in no wise conflicts with, or is repugnant to, any part of the Constitution of the State of Arkansas or of the Constitution of the United Staes.

IV.

Plainiff demurs to that part of Defendant's answer which undertakes to reduce the amount of the recovery asked herein, because, (a) Said attempt so to reduce the amount sued for herein is an effort to attack collaterly the findings of a legally constituted Board and Commission of the State of Arkansas, to-wit: The Arkansas Tax Commission, and (b) because that part of said answer which undertakes to cut down the amount of taxes due, is, in effect, a suit against the State of Arkansas and cannot be maintained.

WHEREFORE, premises considered, Plaintiff prays that this demurrer be sustained and that upon a failure of Defendant further to plead, that she have judgment against it for the amount sued for herein with interest, costs and other proper relief. (Printed Record 27-28).

The Chancellor sustained plaintiff's demurer to the answer, to which ruling the defendant duly excepted, refused to plead further and elected to stand upon its answer. Whereupon the court entered the following decree:

Now on this day, the same being a regular day of the

April Term of this Court, comes the State of Arkansas, by Hal L. Norwood, Attorney General, and by Bradshaw, Rhoton & Helm, Special Counsel, heretofore appointed by the Governor to assist the Attorney General in this case, as by law, in such cases made and provided; and comes also the defedant herein, the St. Louis & Southwestern Railway Company, by its counsel, W. T. Wooldridge, Esq., and Roy Britton, Esq., and this cause coming on to be heard on the plaintiff's complaint, defendant's answer and plaintiff's demurrer to the defendant's answer, and the Court being fully and sufficiently advised in the premises, doth sustain the said demurrer to the said answer, to which ruling and holding of the Court in sustaining said demurrer, the defendant at the time excepted and refused to plead further, and elected to stand upon its answer, whereupon

IT IS THEREFORE, by this Court considered, ordered, adjudged and decreed that plaintiff's demurrer to the answer of defendant be, and the same is hereby, in all respects, sustained, to which action of the Court in sustaining said demurrer, the defendant excepts.

IT IS FURTHER considered, ordered, adjudged and decreed the defendant having failed and refused to plead further, that the plaintiff, the State of Arkansas, have and recover of and from the defendant, the six thousand, seven hundred and ninety-eight and 26-100 Dollars, the amount of franchise tax sued for herein, and the further sum of one thousand, six hundred and ninety-nine and 56-100 Dollars, the penalty accuring to the State on account of the failure of said defedant to pay said franchise tax, on or before the 1st day of August, 1911, and the further sum of

four hundred and one and 16-100 Dollars, the same being interest upon the aforesaid sum of six thousand, seven hundred and ninety-eight and 26-100 Dollars, the franchise tax aforesaid, to which judgment, decree and order of the Court, and the order and judgment of the Court in sustaining the demurrer to defendant's answer and in giving judgment for $401.10 as interest on said franchise tax. The defendant at the time excepts, and prays an appeal to the Supreme Court of Arkansas, which is granted.

The Court doth further find and fix the compensation of the services of Special Counsel herein, Bradshaw, Rhoton & Helm, at twenty (20%) per cent of the amount recovered, and doth direct the Attorney General to deduct said twenty (20%) per cent from the amount of this judgment and decree, and to pay the same over to the said Bradshaw, Rhoton & Helm, as costs of litigation. (Printed Record 30).

STATEMENT

The Attorney General, proceeding under Act No. 112, entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," (approved March 23, 1911), brought this suit to recover the tax levied against the St. Louis Southwestern Railway Company by the Tax Commission under the provisions of said Act for the year 1911, amounting to the sum of $6,798.26, together with a penalty of twenty-five per cent, amounting to $1,699.56, a total of $8,497.82, with interest from September 15, 1911.

Act No. 112 requires each corporation doing business

in the State to make a report to the Arkansas Tax Commission, showing, among other things, the total amount of its capital stock, authorized, subscribed, issued, outstanding and paid up, the market value of the same, and the value of property owned and used by the corporation in the State, and the value of property owned and used by it outside of the State.

Section Six provides that the Tax Commission shall then determine "the proportion of the authorized capital stock of the company *represented by its property and business in this State,*" and shall report the same to the Auditor, who shall charge and certify to the Treasurer annually from such company a tax of one-twentieth of one per cent each year thereafter "upon the proportion of the outstanding capital stock of the corporation *represented by property owned and used in business transacted in this State,*" which tax, it is stated, is "for the privilege of exercising its franchise in this State." The defendant, a Missouri corporation, owning and operating lines of railroad in the States of Illinois, Missouri, Arkansas and Louisiana, over which it carries both state and interstate commerce, made its report under protest (Exhibit "C" to the complaint), reserving the right to contest the validity of the act. This report among other things, showed that the total amount of authorized capital stock was $55,000,000.00 and the total amount of issued and outstanding capital stock was $36,249,750.00. The Commission found the proportion of the outstanding capital stock represented by property owned and used by the defendant in business transacted in the State of Arkansas for the year 1911 to

be $13,596,520.00, on which the franchise tax amounted to $6,798.26.

For the year 1910, the defendant's property in the State of Arkansas was assessed for taxation at the sum of $9,155,965.00, on which it paid taxes to the amount of $191,713.95. On May 4, 1911, the Legislature passed Act No. 251, entitled "An Act to provide the manner for assessing for taxation the property of railroad, express, sleeping car, telegraph, telephone and pipe line companies." This act provided that the property of railroad corporations, and the other named in the title, should be assessed by the Arkansas Tax Commission. Section two of said act is as follows:

> "Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, *tangible and intangible*."

Section Nine requires all railroads to file with the Tax Commission statements showing the tracks, switches, buildings, stores, rolling stock, and all other physical property owned by the company in the State.

Section Ten requires that the statement shall show "the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right of way as given by the charter of the company or statutes of the State, the *franchises, privileges* and everything of any character whatever situated upon the right of

way of the road connected with or appertaining to it in any way which *adds to its earning power* or gives the *railroad value as an entire going thing*."

Section Nineteen requires that in addition to the beforementioned return, railroad companies shall file with the Commission a sworn statement setting forth, among other things, the total capital stock, bonded debt, gross earnings, operating expenses within the state and without the state, and including interstate and intrastate business. The Act then provides that the Commission shall fix the value of the property for the purpose of taxation and certify it to the various counties. Proceeding under this Act, the Arkansas Tax Commission assessed the property of the defendant within the State of Arkansas for the year 1911 in the sum of $11,260,240.00 on which the defendant paid taxes for various purposes, including state, county, school, road and municipal taxes, in the sum of $239,388.84.

The answer of the defendant set forth these facts, and challenged the validity of Act No. 112 on the grounds, (1) that the tax imposed is a tax upon the privilege and right of the defendant to do both an interstate and intrastate business in the State of Arkansas, and is a tax upon the interstate business, property and income of the defendant; that it is a regulation of interstate commerce and a burden thereon, and, therefore, in violation of Section Eight, Article One of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce between the States; (2) That Act No. 112, taken in connection with Act No. 251, imposes upon defendant an additional or duplicate tax in violation of Ar-

ticle 16, Section Five of the Constitution of Arkansas, which requires that all property shall be taxed *Ad Valorem* and at the same rate, and the tax is a denial to defendant of the equal protection of the laws and is taking its property without due process of law, contrary to Article 14, Section One of the Constitution of the United States; and (3) that the Arkansas Tax Commission, in arriving at the proportion of the capital stock represented by the Company's property and business in the State of Arkansas, took into consideration property not owned and business not done by the defendant.

The Attorney General's demurrer to the answer was sustained by the Chancellor, and, the defendant declining to plead further, judgment was entered for the tax and penalty sued for.

On appeal to the Supreme Court of the State, the *A. & P. Tel. Co. v. Philadelphia*, 190 *U. S.*, 160;

The judgment of the Court below bases the liability of the railway company on Act No. 112 of Arkansas, and it is the contention of the plaintiff in error that said Act (which is the basis of this action), as construed by the Supreme Court of Arkansas and as applied to plaintiff in error, is a tax for the privilege of doing interstate commerce in Arkansas, is void as a burden upon and regulation of commerce and is contrary to the due process clause of the Constitution of the United States.

SPECIFICATION OF ERRORS

I.

The Supreme Court of Arkansas erred in holding and

deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the appellant, St. Louis Southwestern Railway Company, on the ground of its being repugnant to that part of Section Eight, Article One, of the Constitution of the United States, vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

II.

The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the appellant, St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section One, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

III.

The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid. The validity of said Act was denied and drawn in question by the St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section One of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall "deprive any

person of life, liberty or property without due process of law."

IV.

The Supreme Court of Arkansas erred in holding and deciding that Act No. 112, of the Legislature of Arkansas, approved March 23rd, 1911, was valid, and in not holding that the tax imposed upon appellant under said Act was a tax for the privilege of exercising appellant's franchise and engaging in business in the State of Arkansas. The validity of said Act was denied and drawn in question by the St. Louis Southwestern Railway Company on the ground of its being repugnant to that part of Section Eight, Article One of the Constitution of the United States, vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

V.

The Supreme Court of Arkansas erred in affirming the action of the Pulaski County Chancery Court in rendering a judgment and decree against the appellant, St. Louis Southwestern Railway Company.

VI.

The Supreme Court of Arkansas erred in not reversing the judgment and decree of the Pulaski County Chancery Court.

BRIEF

I.

ACT NO. 112, OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, BEING THE NECESSARY BASIS FOR THIS SUIT, AND BEING, BY ITS TERMS AND AS SO CONSTRUED, A BURDEN ON INTERSTATE COMMERCE, THERE IS A FEDERAL QUESTION INVOLVED, AND THIS COURT HAS JURISDICTION.

Arrowsmith v. Harmoning, 118 U. S., 194;

Leathe v. Thomas, 207 U. S., 93;

Houston & T. C. Rd. Co. v. Mayes, 201 U. S. 321;

Wabash, Etc., Ry. Co. v. Illinois, 118 U. S., 557;

St. Louis Southwestern Ry. Co. v. State of Arkansas, 217 U. S., 136;

Seabord Air Line Railway v. Duvall, 225 U. S., 477.

II.

ACT NO. 112 OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS IN THIS SUIT, IS VOID, BECAUSE THE TAX IS A REGULATION OF INTERSTATE COMMERCE, IN THAT IT IMPOSES A DIRECT BURDEN UPON THAT PORTION OF THE BUSINESS AND CAPITAL OF THE PLAINTIFF IN ERROR WHICH IS ENGAGED IN AND DEVOTED TO INTERSTATE COMMERCE.

Fargo v. Michigan, 121 U. S., 230;

Philadelphia, Etc., Mail & S. S. Co. v. Pennsylvania, 122 U. S., 326;

Ratterman v. Western Union Telegraph Co., 127 U. S., 411;

Leloup v. Mobile, 127 U. S., 640;

Western Union Telegraph Co. v. Pennsylvania, 128 *U. S.*, 39;

Western Union Telegraph Co. v. Alabama, 132 *U. S.*, 472.

G. H. & S. A. Ry. Co. v. Texas, 210 *U. S.*, 217;

Fargo v. Hart, 193 *U. S.*, 490;

A. & P. Tel. Co. v. Philadelphia, 190 *U. S.*, 160;

Ludwig v. Western Union Co., 216 *U. S.*, 146;

Webster v. Bell, 68 *Fed.*, 183;

State Freight Tax Cases, 82 *U. S.*, 232;

Express Co. v. Seibert, 142 *U. S.*, 339;

Postal Telegraph & Cable Co. v. Adams, 155 *U. S.*, 688;

Allen v. Pullman Palace Car Co., 191 *U. S.*, 179;

Pullman Co. v. Adams, 189 *U. S.*, 420;

Meyer v. Wells Fargo & Co., 223 *U. S.*, 298;

Western Union Telegraph Co. v. State of Kansas, 216 *U. S.*, 1;

Pullman Co. v. State of Kansas, 216 *U. S.* 216;

Williams v. Taladega, 226 *U. S.*, 403;

Baltic Mining Company v. Commonwealth of Massachusetts and S. S. White Dental Manufacturing Company v. Commonwealth of Massachusetts, 231 *U. S.*, 68;

Freeo Valley Rd. Co. v. Hodges, 105 *Arkansas*, 314.

Barrett, President of Adams Express Co., City of New York, 232 *U. S.* 14.

ACT NO. 112 OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, IN CONNECTION WITH ACT NO. 251, SUBJECTS THE PROPERTY OF PLAINTIFF IN ERROR TO DOUBLE TAXATION AND THE TAX IS IN VIOLATION OF THE DUE PROCESS OF LAW CLAUSE, AND BECAUSE IT ATTEMPTS TO IMPOSE TAXES UPON PROPERTY BEYOND THE JURISDICTION OF THE STATE OF AR-

KANSAS; AND SECOND, THE TAX DENIES TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAW.

Atlantic & Tel. Co. v. Philadelphia, 190 *U. S.*, 165;

Postal Telegraph & Cable Co. v. Adams, 155 *U. S.*, 688;

Galveston, Harrisburg, Etc. Ry. Co. v. Texas, 210 *U. S.*, 217;

Western Union Telegraph Co. v. Kansas, 216 *U. S.*, 1;

Pullman Co. v. Kansas, 216 *U. S.*, 56;

Atchison, Etc. R. R. Co. v. O'Connor, 223 *U. S.* 280;

Southern Ry. Co. v. Samuel E. Greene, 216 *U. S.*, 400;

Harris Lumber Co. v. Grandstaff, 78 *Ark.*, 187.

ARGUMENT

I.

ACT NO. 112 OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARHANSAS, BEING THE NECESSARY BASIS FOR THIS SUIT, AND BEING, BY ITS TERMS AND AS SO CONSTRUED, A BURDEN ON INTERSTATE COMMERCE, THERE IS A FEDERAL QUESTION INVOLVED, AND THIS COURT HAS JURISDICTION.

This was an action to recover the franchise tax assessed and levied against plaintiff in error under Act No. 112. Judgment was given for $8,898.00 and was sustained by the Arkansas Supreme Court. That court held that said Act was not in conflict with any of the provisions of the Federal Constitution raised and urged by plaintiff in error in this cause and was valid.

Two Federal questions are presented in the case: (1) that the statute as construed is a burden to interstate com-

merce, and so conflicts with the power of Congress to regulate interstate commerce; (2) that the statute as construed, amounts to a denial of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

The Federal questions raised were not only urged at every stage of the proceedings but were considered by the Supreme Court of Arkansas, which ruled adversely to plaintiff in error, holding that the Act came within the principle announced by the Court in the case of *Maine v. Trunk Ry. Co.*, 142 *U. S.*, 217, which case, we contend, is not applicable, or decisive of the case now before the Court, in view of the later decisions of this Court discussed later on in our brief.

Arrowsmith v. Harmoning, 118 *U. S.*, 194;
Leathe v. Thomas, 207 *U. S.*, 93;
Houston & T. C. Rd. Co. v. Mayes, 201 *U. S.*, 321; L.
Wabash, Eetc., Ry. Co. v. Illinois, 118 *U. S.*, 557;
St. Louis Southwestern Ry. Co., v. State of Arkansas, 217 *U. S.*, 136;
Seaboard Air Line Railway v. Duvell, 225 *U. S.*, 447.

II.

ACT NO. 112 OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS IN THIS SUIT, IS VOID, BECAUSE THE TAX IS A REGULATION OF INTERSTATE COMMERCE, IN THAT IT IMPOSES A DIRECT BURDEN THAT PORTION OF THE BUSINESS AND CAPITAL OF THE PLAINTIFF IN ERROR WHICH IS ENGAGED IN AND DEVOTED TO INTERSTATE COMMERCE.

It will be noted from Section Six of the Act that the amount of the tax is ascertained by the relative amount of *"property owned and used in business transacted in the State."* Although the law designates the tax as a franchise tax, it is difficult to determine whether or not it is in fact a property tax, or a tax on a privilege or franchise. The substances and not the form governs. The operation of the law is the true test as to the nature of the tax. If, however, it is an excise tax on a privilege, it is obviously void, because the privilege it seeks to reach is largely the right to engage in interstate commerce within the state. The answer, which is of course admitted by the demurrer, shows that 78 per cent of the business done by appellant in the State of Arkansas was interstate commerce, and only 22 per cent intrastate commerce. As, in the words of the law, "the proportion of the authorized capital stock of the company represented by its property in this state" is the subject of the tax, it necessarily follows that 78 per cent of the business used as a basis is interstate commerce, which is not subject to taxation by the state. It is well settled that a State cannot tax interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation or on the occupation or business of carrying it on, for the reason that such taxation is a burden on interstate commerce and amounts to a regulation of it, which belongs solely to Congress.

Fargo v. Michigan, 121 *U. S.*, 230;

Philadelphia Etc., Mail & S. S. Co. v. Pennsylvania, 122 *U. S.*, 326;

Ratterman v. Western Union Telegraph Co., 127 U. S., 411;

Leloup v. Mobile, 127 U. S., 640;

Western Union Telegraph Co. v. Pennsylvania, 128 U. S. 39;

Western Union Telegraph Co. v. Alabama, 132 U. S., 472;

G. H. & S. A. Ry. Co. v. Texas, 210 U. S., 217;

Fargo v. Hart, 193 U. S., 490;

A. P. Tel. Co. v. Philadelphia, 190 U. S., 160;

Ludwig v. Western Union Co., 216 U. S., 146;

Webster v. Bell, 68 Fed. 183;

State Freight Tax Cases, 82 U. S., 232;

Express Co. v. Seibert, 142 U. S., 339;

Postal Telegraph & Cable Co. v. Adams, 155 U. S., 688;

Allen v. Pullman Palace Car Co., 191 U. S., 179;

Pullman Co. v. Adams, 189 U. S., 420;

Meyer v. Wells Fargo & Co., 223 U. S., 298;

Western Union Telegraph Co. v. State of Kansas, 216 U. S., 1;

Pullman Co. v. State of Kansas, 216 U. S., 216;

Williams v. Taladega, 226 U. S., 403;

Baltic Mining Company v. Commonwealth of Massachusetts and S. S. White Dental Manufacturing Company v. Commonwealth of Massachusetts, 231 U. S., 68;

Freeo Valley Rd. Co., v. Hodges, 105 *Arkansas*, 314.

Barrett, President Adams Express Co., City of New York., 232 U. S. 14.

In *Fargo vs. Michigan, supra*, Mr. Justice Miller said:

"The proposition that the States can, by way of tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such

corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the Constitutional provision cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

The case at bar falls within the principle stated. The amount of the tax is based upon the property and business of appellant and is levied for the privilege of "exercising its franchise" within the State. Its property is used for carrying on interstate commerce. It exercises its franchise by engaging in the business of transporting freight and passengers, 78 per cent of which is interstate commerce.

It may be conceded that a state can impose a license upon business conducted by carriers within a State, but in the imposition of such a tax, the intrastate business must be discriminated from the interstate business, or it must be made capable of such discrimination, so that it may clearly appear that the intrastate business alone is taxed.

Webster v. Bell, 68 *Fed. Rep.* 183.
Ratterman v. Telephone Co., 127 *U. S.*, 411.
State Freight Tax Cases, 82 *U. S.*, 232;
Express Co. v. Seibert, 142 *U. S.*, 339.

In *Postal Telegraph & Cable Co. v. Adams*, 155 *U. S.*, 688, the Supreme Court of the United States had before it a law of Mississippi which levied what was called a "privilege tax" on foreign corporations. Telegraph companies own-

ing more than one thousand miles of wire in the State were required to pay $3,000.00, and those owning less were required to pay $1.00 per mile, and it was specified that the tax thus levied was *"in lieu of other State, county and municipal taxes."* On the Telegraph Company's refusal to pay, the collector brought suit for the privilege tax as well as for the *Ad Valorem* taxes in the several counties. The Supreme Court of Mississippi held that the tax was imposed in lieu of all others as a privilege tax and the amount was graduated according to the amount and value of the property measured by miles. That Court said:

> "It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax."

Commenting upon this decision, the late Mr. Chief Justice Fuller, speaking for the court, said:

> "This exposition of the statute brings within the rule where *ad valorem* taxes are compounded and commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power. * * *
>
> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a

corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.

* * * *

Doubtless, *no state could add to the taxation of property according to the rule of ordinary property taxation the burden of a license or other tax on the privilege* of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The tax under the Mississippi law was sustained, therefore, because it was *in lieu of all other taxation* and was levied as a just equivalent for a property tax. The tax in the case at bar, however, is in addition to the property tax, and, in the words of the opinion just quoted, it seeks to "add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate commerce or for the carrying on of such commerce."

In *Allen v. Pullman Palace Car Co.*, 191 U. S. 179, a statute of Tennessee, very similar in its purpose and operation to the one involved in the case at bar, was considered.

The Tennessee act of 1887 levied on each sleeping car a tax of $500.00 per annum "for the privilege of doing business in the State." On the authority of *Pickard v. Pullman Co.*, 117 *U. S.* 34, the United States Supreme Court held the act to be invalid, and Mr. Justice Day, speaking for the court, said:

> "Under the earlier Act the tax is required for the privilege of running and using sleeping cars on railroads not owning the cars. In the later Act it is enacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars, and is precisely the privelege to be paid for under the first Act, neither more or less. In neither Act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the State, but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The Act in its terms applies to cars running through the State as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State.
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>
> "The statute now under consideration requires payment of the sum exacted *for the privilege of doing any business*, when the *principal thing to be done is interstate traffic*. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature in the terms of the Act, impose upon the entire business of the company."

The tax in that case was for the privilege of doing business within the State. Under Act. No. 112, the tax is for the privilege of exercising the company's franchise in the State. We fail to see any difference between the two expressions. The tax in the Tennessee case was based upon

cars used in carrying both state and interstate commerce, while under the Arkansas statute, the tax is based upon *all property* used in carrying both state and interstate commerce.

In *Leloup v. Port of Mobile*, 127 *U. S.* 640, Mr. Justice Bradley said:

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

It cannot be denied that the Arkansas Act covers the entire operations of the company. Every state tax levied upon or measured by the interstate business of a corporation,—no matter what name it is given in the law—which has been passed upon by the Supreme Court of the United States, has been held invalid unless such a tax is in lieu of all other taxes and is intended as a just equivalent for an *ad valorem* tax, with the possible exception of that involved in the case of *Maine v. Grand Trunk R. R.*, 142 *U. S.* 217. The tax in that case was an excise tax for the privilege of "exercising the franchise in the State," and the amount was determined by the transportation receipts from both state and interstate commerce. The validity of the tax was sustained by a divided court. Justices Bradley, Harlan, Lamar and Brown dissenting. The theory of this case is commented upon at length in *G. H. & S. A. Ry. v. Texas*, 210 *U. S.* 217, which involved the validity of the Texas tax on the gross receipts of railroads, and the Maine case was

urged in support of the contention of the State that the tax was constitutional.

Mr. Justice Holmes said:

"Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinquishing them became greater when it was decided, not without much debate and difference of opinion, that *interstate carriers' property might be taxed as a going concern. In Wisconsin & M. R. Co. v. Powers, supra,* the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. *In Maine v. Grand Trunk R. R. Co.* supra, 'an annual excise tax for the privilege of exercising its franchise' was levied upon everyone operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a *measure of the value of the property per mile.* That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The building of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and *this excise with the local tax were to be in lieu of all taxes.* The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. *The excise was an attempt to reach that additional value.* The two taxes together fairly may be called a commutation tax."

Thus it will be seen that the Maine law laid a property tax on the buildings, land and other property outside of the

right of way and then this local tax, and the excise tax was in lieu of all other taxation. So that, as explained by Mr. Justice Holmes, the excise tax was in effect a property tax, or the two together was a commutation tax; the excise tax was intended to reach the value of the property "as a going concern," which of course was not reached by the localtax. The Arkansas law cannot be sustained on this theory, because Section Ten of Act No. 251, provides that there shall be included in the valuation of the property by the Tax Commission everything that "gives the railroad value as a going thing." Therefore, the theory on which the Maine law was sustained does not apply to the Arkansas law.

Furthermore, this case has, in a sense, been overruled in the recent case of *Meyer v. Wells-Fargo & Co., 223 U. S. 298.* This case involved the statute of Oklahoma, which levied a tax on the gross receipts of public service corporations (3 per cent on Express Companies), and provided that if such public service corporation operate partly within the State and partly without the State, "it shall pay a tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business." Mr. Justice Holmes said:

> "The plaintiff's receipts are largely from commerce among the States and it also received large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself, it is bad on the former ground, and that whatever it is, it is bad on the latter. * * * *It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk R. Co.*, 142 *U. S.* 217, and to suppose it intended to *reach only the additional value given by its being part of a going concern to property already taxed in its separate items.* There is nothing sufficient

to indicate such a limitation, and for the reasons given above, on the authority of *Fargo v. Hart, supra*, it is plain that the gross receipts from all sources could not be used as a means for estimating the going value of the property in the State. We may add in this connection that this same requirement as to the total gross receipts show that it is impossible to save the constitutionality of the Act by construing it as referring only to the receipts from commerce wholly within the State."

It is plain from this opinion that the court does not approve of the use of gross receipts from all sources for estimating the going value of property in the State. As we have pointed out, the going value of the property of plaintiff in error has already been assessed and taxed under Act No. 251, but if it were not taxed, the entire "property and business" could not be used for estimating such value, because such property is used for carrying on a business which consists mostly of interstate commerce. We submit that there is no material difference between the two methods.

Western Union Telegraph Co., v. State of Kansas, 216 *U. S.* 1, is on all fours with the case at bar, and is decisive of the invalidity of the so-called franchise tax levied under Act No. 112. An action was brought by the State of Kansas to oust the Western Union Telegraph Company from doing business wholly internal to that State, because of its failure to pay the so-called charter fee of a certain percentage of its entire capital stock. The fee, as levied by the Charter Board under authority of the law, amounted to $20,100.00. The court held that the tax was invalid under the commerce and due process of law clause of the Federal Constitution, as necessarily amounting to a burden and tax

upon the company's interstate business and on its property located and used outside of the State. In an able opinion, Mr. Justice Harlan reviewed the cases and said:

> "We are aware of no decision of this court holding that a State may, by any device or in any way whether by a license tax in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State although the State may tax the corporations property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made '*dependent in fact* on the value of its property *situated within the State*. *Postal Telegraph Cable Co., v. Adams* 155 *U. S.* 688. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may *go into the State without obtaining a license from it for the purposes of its interstate business and without liability to taxation there on account of such business.*"

The provision restricting the application of the law to intrastate business only was discussed, but the court held that it regarded the substance and not the form, and although the expressed intention of the statute was not to burden interstate commerce, it did in fact burden it. The court then said:

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent of *its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both *within* and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and *tax on the company's interstate business*, and on its property located or used outside of the State."

Several of the cases cited in this brief were then considered and after quoting from Leloup *v. Mobile, supra,* the court said:

> "So, in the case now before us, the exaction as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay a *given per cent of its authorized capital stock,* is for every practical purpose, a tax both on the company's local business in Kansas, and *on its interstate business, or on the privilege of doing interstate business;* for the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words,* a condition of doing local business, that the telegraph company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the State as a fee or tax on the sale of an article imported only for sale, or as a tax on the occupation of an importer would be a tax on the property imported."
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> "We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the State School Fund a given per cent of its authorized capital, representing all its business and property elsewhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise, is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each State would continue

to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulation which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental, in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land.

* * * *

In the present case, the State of Kansas demands, in the form of a fee, a given per cent of all the capital of the foreign corporation, without any discrimination between the capital representing the business and property of the telegraph company outside of the State and the capital representing such of its business and property as are wholly local to the State. And it seeks the aid of the court to oust the telegraph company from continuing to do business in the State, so far as local business is concerned, because, and only because it will not surrender its immunity from state taxation *in reference to its interstate business* and its property outside of Kansas."

We have quoted at length from this opinion to emphasize the two reasons assigned by the court for holding the statute invalid that is, (1), because it imposed a tax on property outside of the state, and (2) *because it imposed a tax on the interstate business of the company within the state.* The statute of Arkansas is very similar to the Kan-

sas statute. In one the tax is called a "franchise tax;" in the other it is called a "charter fee." They are both levied for the privilege of exercising the franchise of the company within the State. The Kansas law imposed a tax on *all* of the capital stock, while the Arkansas statute levies on that proportion of the capital stock represented by the property and business of the company in the State, but the court held the Kansas law violated the commerce clause of the Constitution of the United States, not only because it applied to property outside of the State but also because it applied to property used within the State for conducting interstate transportation. There was in fact stronger reason for sustaining the validity of the Kansas statute than there is for holding the Arkansas statute valid, because for a failure to comply with the former, the company forfeited its right to do purely domestic business in the State, while for a failure to comply with the latter, the company, under Section Fifteen, forfeits its right *to do any business within the State*. Having squarely decided that the Kansas tax amounted to a burden upon the company's interstate business, we see no reason why the tax in the case at bar is not equally objectionable.

Pullman Co. v. State of Kansas, 216 *U. S.* 56, involved the same statute as applied to the Pullman Company, and the tax was again considered and again held invalid.

Act No. 112 makes no distinction between the intrastate and interstate business of plaintiff in error, but the tax is levied upon its entire business and property within the State. No effort was made to separate the intrastate

from the interstate business. For this reason this court in *Williams v. Taladegra*, 226 U. S., 404, held the tax illegal. The court speaking through Mr. Justice Day, on page 419, said:

> "We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole and makes the tax unconstitutional and void. *In Leloup v. Port of Mobile*, 127 U. S. 640, Mr. Justice Bradley, speaking for the court, said (p.647,:
>
> 'It is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination.'"

Citing *Western Union Co. v. Alabama Assessment Board*, 132 U. S. 472, 477; *Allen v. Pullman Car Co.*, 191 U. S. 171, 179.

In the very recent case decided by this court on November 3, 1913, *Baltic Mining Co. v. Commonwealth of Massachusetts and S. S. White Dental Manufacturing Co. v. Commonwealth of Massachusetts*, 231 U. S., 68, the validity of an excise tax imposed by a statute of Massachusetts upon certain foreign corporations was sustained by this court, and it may be contended, is an authority to uphold the tax levied under Act No. 112 of Arkansas; but the opinion of the court in that case is not decisive of the one now before the court for the reason that the Supreme Court

of Massachusetts had construed the statute, under which the tax was levied, not to apply to corporations engaged in railroad, telegraph and telephone business, and not to corporations whose business was interstate commerce or who carried on interstate and intrastate business in such close connection that the intrastate business could not be abandoned without serious impairment of the interstate business of said coporation. Had the Supreme Court of Massachusetts decided that the tax levied was valid as to railroad companies engaged in interstate commerce, this court, we are sure, would have held the tax invalid as to such companies, as being a burden upon the interstate commerce. In this case on page 84 Mr. Justice Day, speaking for the court, said:

> "We have no fault to find with the conclusion that this is an excise tax. See also *Provident Institution v. Massachusetts, supra; Hamilton Co. v. Massachusetts, supra,* in which this court had occasion to consider the taxing system of Massachusetts. That the State may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted, and such has long been the legislative policy of the Commonwealth of Massachusetts, as appears from the history of legislation set forth in the opinions in the cases last cited. Construing the Act in question, the Supreme Judicial Court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate business. *Attorney General v. Electric Storage Battery Co.*, 188 *Massachusetts*, 239.

The tax is levied upon the privilege of carrying on business within the State and not upon property therein which is otherwise taxed."

We call the court's special attention to the very recent case of *Barrett, President of Adams Express Co., v. City of New York*, decided by this court January 5th, 1914 *232 U. S.* 14. The court commenting on and construing certain sections of ordinances of the City of New York, providing for licenses upon the express company, on page 30, said:

"But, if the above-mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional."

It was shown in this case that 98 per cent of the business of the express company was interstate and as the ordinance requiring the tax affected interstate as well as intrastate business, the same were void as being a burden to interstate commerce.

In *Postal Telegraph Co. v. Adams, supra*, one of the considerations which the court held to be material in determining the validity of a tax of this nature was the manner in which its collection was enforced, for it was said that under some circumstances such a tax may be valid "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." Section 15 of Act No. 112 provides that if the corporation fails or refuses to pay the tax for 30 days after theexpirationof the time limited by the Act, the Attorney-General shallbring an

action to forfeit the charter of the corporation, and Section Twenty provides that if any corporation shall have paid the franchise tax and shall have received a certificate authorizing it to do business in the State forthe term of five years, and it shall fail and refuse to pay the tax during the term of said certificate, the Tax Commission shall cancel the certificate and the corporation shall thereby forfeit its right to do business in th eState. This is a direct attempt to take away from railroad companies the right to engage in interstate commerce within the State, and is certainly not one of the ordinary means of collecting taxes.

In *Allen v. Pullman Co., supra,* it was intimated that only the right to do intrastate business could be taken away by the State, and that as this business was merely incidental, to interstate business and not compulsory, no actual coercion would result. This was because of the peculiar condition of the Kentucky laws. It certainly would not apply to a railroad corporation doing business in the State of Arkansas.

Article 17, Section One of the Constitution of Arkansas declares all railroads to be common carriers, and Section Three of the same article declares that all individuals shall have equal rights to the transportation of said railroads. *Section 6747, 6592 and 6593 of Kirby's Digest* of the Statutes of Arkansas would seem to make it impossible for railroad companies to voluntarily refuse to carry passengers and property wholly within the State. This question, however, is not pertinent to the present case, because the tax is imposed on the capital stock represented by all of the property of the company in the State used for

carrying on all of its business in the State, and the forfeiture provisions, of course, relate to the entire business. In other words, the appellant could not escape the attempted enforcement of the law by withdrawing from the intrastate business in Arkansas, because under the plain provisions of the law, its capital stock represented by its property in the State (even though such property was exclusively used for carrying on interstate transportation,) would be subject to the tax.

In a recent case by the Supreme Court of Arkansas decided November 18, 1912, *Freco Valley Rd. Co. v. Hodges*, 105 *Ark.*, 314, it was held that a railroad company could not surrender its charter and cease to do business, and that *Section 957 of Kirby's Digest* of the Statutes of Arkansas, providing for the surrender of charters by corporations, did not apply to railroad companies. Hence, a railroad company doing interstate business in Arkansas could not cease to do intrastate business without incurring the penalties provided by the statutes of the State; so, we see that once a railroad, always a railroad.

In *Ames v. Union Pacific R. R. Co.*, 64 *Fed. Rep.* 165, 177, the court held that:

> "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

We submit, therefore, that under the decisions of this court, the tax is clearly a regulation of interstate commerce and a burden to such commerce and is invalid.

III.

ACT No. 112 OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, IN CONNECTION WITH ACT NO. 251, SUBJECTS THE PROPERTY OF PLAINTIFF IN ERROR TO DOUBLE TAXATION AND THE TAXIS IN VIOLATION OF THE DUE PROCESS OF LAW CLAUSE, AND BECAUSE IT ATTEMPTS TO IMPOSE TAXES UPON PROPERTY BEYOND THE JURISDICTION OF THE STATE OF ARKANSAS;AND SECOND, THE TAX DENIES TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAW.

We have demonstrated that if the tax levied under Act No. 112 is what it purports to be—a franchise tax—, it is in effect a tax on the privilege or right to engage in interstate commerce within the State, or a tax on property used for carrying on such commerce; but if it is not what it purports to be, it is necessarily a property tax. The United State Supreme Court, in the cases before cited have sustained the validity of such impositions only when the gross receipts from interstate commerce, or property used in carrying on such commerce, are used as a measure for a property tax in lieu of all other taxation by the State, counties and municipalities. Under Act No. 251, the property of plaintiff in error was assessed by the Arkansas Tax Commission, and under Section Two of that Act the Commission necessarily included all of the property of the plaintiff in error, both *tagible and intangible*, including even the

value of "the railroad *as an entire going thing*," as required by Section Ten. It could not therefore, be contended that there was any other property, either tangible or intangible, belonging to the company in the State that was not taxed. On this property, as assessed by the same body that levies the franchise tax, the company paid taxes in the sum of $239,388. 84 for the year 1911. And yet, to this, is added an additional amount of $6,798.26, being a tax on the "capital stock of the company represented by its property and business within the State." By whatever name it may be called, whether a "franchise tax" or a tax for the "privilege of exercising its franchise," the levy made under Act 112 is necessarily double taxation.

In *Harris Lumber Company v. Grandstaff*, 78 *Ark.* 187, the Arkansas Supreme Court had under consideration the effect of *Section 6936 of Kirby's Digest* of the Statutes of Arkansas, which requires of certain corporations a report very similar to the reports required by Act No. 112 and Act No. 251. Mr. Justice Battle, speaking of this statute, on page 192, said:

> "It makes the capital stock a subject of taxation, and makes it the duty of the corporation to give the assessor a statement showing the amount and value of it. Ordinarily, the capital stock is the only means a corporation has of acquiring property. *Both the property thereby acquired and the capital stock used in purchasing it, under the Constitution of this State, are not subject to taxation. (Hempstead County Bank v. Hempstead County, 74 Ark., 37) This would be double taxation.*"

Act No. 251 provides for the taxation of the real and personal property of railroad corporations. Act No. 112 provides for taxing the capital stock used in acquiring that

property. We submit that this is double taxation.

In *Atlantic Etc., Tel. Co. v. Philadelphia*, 190 *U. S.*, 160, this court, speaking of double taxation, on page 165, said:

> "Now, the license in question is, as stated, confessedly not for the purpose of raising revenue. Indeed, if it were, as it appears by the affidavit of defence that the company had paid all taxes charged upon its property as property, it might be obnoxious to a complaint of double taxation. It is not like the tax in *Postal Cable Company v. Adams*, 155 *U. S.* 688, which, although called a privilege tax, was in fact a property tax, and the only property tax upon the company, in respect to which we said (p. 696):
>
> 'Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license of other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.'"

The conclusions reached by this court in the case of *Southern Ry. Co. v. Samuel E. Greene*, 216 *U. S.* 400, are not conclusive as to the validity of the tax now before the court. In the above case the payment of the tax was not made a condition precedent to the right to carry on business, as is the case under Section Fifteen and Twenty of Act No. 112. Under Section Fifteen of this Act, if the tax levied was not paid, the Attorney General or the prosecuting attorney on the request of the Tax Commission are required to institute suit against such corporation refusing

to pay the tax, to forfeit and annul its charter, and if the court found that the non-payment of such tax was wilfull and intentional, should revoke and annul its charter to do business in the State. Hence, we see that under said statute, the enforcement of the tax is not left to the ordinary means devised for the collection of taxes. This was the contention of the counsel for defendant in error in its brief before the Supreme Court of the State of Arkansas. While this suit was brought by the then Attorney General to collect such tax in the ordinary way and he elected this method of collecting the tax, his action would not be binding upon his successor in office, and any succeeding Attorney General or prosecuting attorney could proceed against the said corporation refusing to pay the tax in a suit to have its charter revoked and annulled, or both remedies might have been, or may be pursued.

We respectfully submit, therefore, that the judgment of the Supreme Court of Arkansas should be reversed, and the tax attempted to be levied and collected under Act No. 112 should be held invalid, because (1) it is a tax on interstate commerce, in that it is a tax on the right or privilege of engaging in interstate commerce within the State of Arkansas, and is, therefore, a regulation of such commerce and a burden thereto, and so violates the commerce clause of the Constitution of the United States; (2) because its payment is made a condition precedent to continuing to carry on interstate business and non-payment subjects the plaintiff in error to a forfeiture of its right to engage in interstate commerce within the State; and (3) all of the intangible property of the plaintiff in error has been assess-

ed and taxed under Act No. 251, and the tax levied under Act No. 112 is, therefore, a double tax and is contrary to the due process of law clause of the Constitution of the United States.

Respectfully submitted,

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IV.

LIST OF CASES DISCUSSED

LIST QF CASES DISCUSSED—*Continued*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY .....*Plaintiff in Error,*

v. No. 470.

STATE OF ARKANSAS *ex rel.* HAL L. NORWOOD, ATTORNEY GENERAL .....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This was a suit by the State of Arkansas, on the relation of her Attorney General, to recover from the plaintiff in error taxes alleged to be due said State by virtue of an act of the General Assembly of Arkansas, approved March 23, 1911, entitled "An Act for an annual franchise tax on corporations doing business

in the State of Arkansas," hereinafter referred to as Act No. 112.

The cause was originally tried in the chancery court of Pulaski county, Arkansas, where a demurrer to the defendant railway company's answer was sustained. The Supreme Court of Arkansas, on the 27th day of January, 1913, affirmed the decree of the lower court. This court is now asked to review on writ of error the judgment of the Supreme Court of Arkansas.

The question involved and now before this court for decision is as to the constitutionality of Act No. 112 aforesaid, under and by virtue of which the State of Arkansas is claiming from the railway company the sum of $8,497.82, tax and penalty. And the main question before this court for review is whether or not the Supreme Court of Arkansas erred in holding that said act was not contrary to *Article* 8, *Section* 1, *of the Constitution of the United States,* as being a burden and encumbrance upon interstate commerce, or the right to engage in such commerce.

To a clear understanding of the principles involved, the court's attention is directed to the taxing acts of the State of Arkansas relative to the taxation of railway corporations.

On May 4, 1911, the General Assembly of Arkansas passed an act entitled "An Act to provide the manner of assessing for taxation the property of rail-

roads, express, sleeping car, telegraph, telephone and pipe line companies," said act being Act No. 251 of the session of 1911, and to be hereinafter referred to as Act No. 251, the principal provisions of which said act are as follows:

"Section 1. Every railroad chartered, organized or operated under the provisions of chapter 133 of Kirby's Digest, shall, for purposes of taxation, be held to be a railroad, and shall be assessed for taxation by the Arkansas Tax Commission. Said commission shall ascertain the par value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture, other property, real and personal, owned by each of the railroads or railways of each company or corporation having existence under the laws of this State or incorporated in whole or in part therein, and running through or in this State. Such property shall be listed and assessed with reference to its amounts, kind and value, the first Monday in June of each year.

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes, the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Sections 3, 4, 5, 6 and 7 relate to the assessment of telegraph, telephone, pipe line, sleeping car and express companies.

"Section 8. The Arkansas Tax Commission shall on or before the 15th of May of each year notify each person or corporation owning, operating or constructing a railroad in this State, as defined in section 1 of this act, and each telegraph, telephone, sleeping car, express and pipe line company, as provided by section 3 of this act, that the statements and schedules required by sections 4, 5 and 9 of this act are required to be filed by the first day of July next ensuing. Said notice shall be printed or written, and it shall be served by delivering the same to any agent of such railroad or other company, or by depositing the same in any postoffice, addressed to such person or corporation at a point where the general office of such company is established, or at any city or town where such company is transacting business or has a station or office. Failure to receive the notice herein provided shall not be a defense for not making and filing the schedules by this act required within the time required to be made.

"Section 9. Each person, company or corporation operating a railroad as defined by section 1 of this act shall on the first day of July of each year make out and file with the Arkansas Tax Commission statements or schedules showing the length of the main line and the length of all sidetracks, switches and turnouts in each county in which the railroad may be located and each city or town in said county through or into which the railroad may run; also the depots, section houses, roundhouses, machine shops, water tanks, coal chutes, and all other buildings and fixtures of every kind used for railroad purposes and the counties, districts and towns in which located; also all materials and stores of every kind, including tools and machinery at machine and repair shops, crossties, timbers, rails, and all other kind of apparatus not coming within the class known as fixtures; also all rolling

stock; said statement setting forth distinctly the number of locomotives of all classes, passenger cars, dining cars, mail cars, express cars, coal cars, pay cars, construction and working cars, caboose cars, hand cars, push cars, cattle cars, log cars, and all other kinds of cars belonging to such railroad. Said schedule shall also include all rolling stock not belonging to said company, but leased for its use for a term of not less than six months, it not being intended to tax rolling stock temporarily coming into or passing through this State, but to tax such as is actually owned or leased by the company.

"Said schedule shall show the total number of miles of main track of railroad owned and operated by such person, company or corporation in other States and the total number of miles of main track owned or operated in this State. Likewise it shall set forth the number of miles of track on which said rolling stock is used in other States.

"Section 10. Said statements or schedule shall state the actual full and true value in detail of the several items listed, also the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing.

"Section 11. The statements or schedules shall be sworn to on behalf of the railroad by some officer or employee who is familiar with the facts and who is in a position, because of the character of his employment, to know the truth of the statements to which he is swearing. The affidavit set out in detail in section

6906, Kirby's Digest, shall be appended to each schedule filed by each railroad. False statements made and sworn to in any schedule required by section 9 of this act shall be deemed to be perjury.

"Section 12. The Arkansas Tax Commission shall meet the first Monday of July each year for the purpose of assessing the railroad property of the State, and the property of the companies mentioned in section 3 of this act. Before entering upon the discharge of their duties each member of the commission shall take and subscribe an oath that he will well and truly value and assess the property of the companies and corporations this act makes it the duty of the tax commission to assess. Said oath shall be entered at length upon the books used by the commision for recording the assessments of such railroads and corporations. The commission shall proceed to examine the statements and schedules of such railroads and corporations filed with it as herein provided. If such statements are made out in accordance with the provisions of this act, and in the opinion of the commissioners the valuations fixed by the railroads or corporations is the true and full value in money of the property listed, the commission shall accept said valuation and appraise the property at same. If the commission shall be of the opinion that the valuation fixed in any statement is below the true and full value in money of the property it shall fix the value in each such case at a sum which it believes to be the true and full value in money of the property. In valuing the property of every railroad the commission shall take into consideration the entire railroad, whether all or only a part of it is in this State.

"Section 13. The commission shall determine in the case of each railroad it assesses the value per mile of the main track, the value per mile of the sidetrack,

turnouts, the value of each building and the value of the average stock of materials, including machinery and repair shop stores, timber, ties and rails carried the next year preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads in this State the commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads of this State filed and prepared in accordance with the requirements of this act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the value per mile of the rolling stock of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles or fraction of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in said county.

"Section 14. The buildings and sidetracks of railroads shall be assessed as real estate, and each building or sidetrack shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made.

"Section 15. All other personal property belonging to a railroad except rolling stock and material, as provided in section 14 of this act, shall be listed and assessed by the assessor in the county where situated, also all real estate, including buildings and structures thereon, other than that used for railroad purposes, shall be listed and assessed by the assessor in the county where situated at the same time and in the same manner as real property belonging to individuals is by law required to be listed and assessed.

"Section 16. Any person or corporation operating, owning or constructing a railroad in this State or any other corporation defined in section 3 of this act, who shall fail to make return of the statements and schedules required by sections 4, 9 and 19 of this act, to the Arkansas Tax Commission by the first Monday in July of each year, such person or corporation shall forfeit to the State as a penalty not less than one thousand dollars nor more than ten thousand dollars for each offense, to be recovered in a proper form of action in the name of the State of Arkansas, and paid into the State treasury. Upon failure of any person or corporation to make return at the time required, the Arkansas Tax Commission shall notify the Attorney General of such default, and it is made the duty of the Attorney General to institute the necessary legal proceedings to collect such penalty.

"Section 17. If any person or corporation owning, operating or constructing any railroad within this State or any of the corporations whose assessment is provided for in section 3 of this act shall neglect or refuse to give the Arkansas Tax Commission statements and schedules required by this act by the first Monday in July each year, the said Arkansas Tax Commission shall forthwith proceed with the assistance of the assessors in the several counties in which

such railroad or the property of such other company is located, if such assistance shall be required, to ascertain the necessary facts in connection with the location and value of the property belonging to the defaulting railroad or other company. In the discharge of its duty the commission shall have power to summon before it any person as a witness and to have produced the books and papers of such railroads or other company, to administer oaths and to examine any person summoned before it touching any matter necessary to enable the commission to arrive at a just and correct value of and description of the defaulting railroads or other company's property. The commission shall have power to direct its writs or summons to any sheriff of any county of this State, and it shall be the duty of such sheriff to execute any and all processes to him directed by the commission. Any person called before said commission to testify shall be guilty of perjury if he testifies falsely. The commission having ascertained in the manner herein indicated the description and values of the railroads' and other company's property in the county the same shall be certified out to the respective county assessors in the manner prescribed in section 18 of this act.

"Section 18. When the Arkansas Tax Commission shall have ascertained the value of the property of any railroad as herein provided or of the companies and corporations whose assessment is provided for in section 3 of this act, the valuation shall be entered in detail in a record to be kept by the commission for that purpose. Before the first day of September of each year it shall be the duty of the commission to certify out through its chairman and secretary to the assessor of each county in which any railroad is located, or other company or corporation may be doing business, so much of said value as is located

in said county and in the several districts and towns in said county. The assessor shall enter upon the proper records the assessments so certified to him.

"Section 19. In addition to the returns and schedules by this act required to be filed with the Arkansas Tax Commission by the several railroads, it shall be the duty of every railroad to file with said commission at the same time the other returns by this act prescribed are filed, a sworn return wherein shall be set forth:

"1. The name and principal office of the railroad and the State under whose laws it is incorporated.

"2. The total capital stock of every kind whatsoever, whether common or preferred, outstanding. The market, and, if no market, the actual value of all such stock.

"3. The total outstanding bonded indebtedness against the railroad. The market, and, if no market, the actual value of the bonds representing such bonded indebtedness.

"4. The total gross earnings, operating expenses and net earnings of the road for the year next preceding the first Monday of June of the year for which the return is made.

"5. If the railroad operates in other States, the total gross earnings, operating expenses and net earnings for that part of the railroad located in Arkansas, including interstate, as well as intrastate business.

"Section 20. The return of the railroad companies and other corporations whose assessment is provided for by section 3 of this act, shall not be held to be conclusive as to the value of the property returned. But

the Arkansas Tax Commission may make such assessment of such property as it may deem just and equitable. The commission shall have the power to require the attendance of any president, secretary, receiver, accounting officer, servant or agent of any corporation whose property this act makes it the duty of the commission to assess; and any such officer who shall refuse to attend before the commission when it is his duty, or he is required to do so, or refuses to submit to the inspection of said commission any books or papers of such corporation in his possession, custody or control, or shall refuse to answer such questions as shall be put to him by the commission or its order touching the business, property or money and credits, and the value thereof, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined any sum not exceeding five hundred dollars and costs. Any president, secretary, receiver, accounting officer, servant or agent of any company who shall knowingly make any false answer to any question put to him by the commission or by its order touching the business, property, money and credits, and the value thereof, of said company, shall be guilty of perjury.

"Section 21. The returns prescribed in sections 3 and 9 of this act shall be made upon such forms as the Arkansas Tax Commission shall prescribe.

"Section 22. All laws and parts of laws in conflict with this act be and the same are hereby repealed, and this act being necessary for the immediate preservation of the public health, peace and safety, shall take effect and be in force from and after its passage."

At the same session the General Assembly passed said Act No. 112, providing for the payment of a fran-

chise tax by both domestic and foreign corporations. Amongst other provisions relating to foreign corporations, are the following:

"Section 4. Each foreign corporation for profit, doing business in this State, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the Arkansas Tax Commission annually, or before July 1, and if such tax commission shall have been abolished by law, then the assessor of the county in which the principal place of business of such corporation in this State shall be.

"Section 5. Such report shall contain:

"1. The name of the corporation and under the laws of what State or country organized.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock, and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, the amount of capital stock paid up, and the market value of same.

"7. The nature and kind of business in which the company is engaged, and its place or places of business, both within and without the State.

"8. The name and location of its office or offices in this State, and the names and addresses of the officers or agent of the corporation in charge of its business in this State.

"9. The value of the property owned and used by the company in this State, where situated and the value of the property owned and used outside of this State.

"10. The change or changes, if any, in the above particulars made since the last annual report.

"Section 6. Upon the filing of the report provided for in sections 4 and 5 of this act, the commission or assessor, as the case may be, from the facts thus reported and any other facts coming to its or his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in this State on or before July 20, and shall report the same to the Auditor of the State who shall charge and certify to the Treasurer of the State on or before August 1, for collection as herein provided, annually from such company, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State, one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State."

Sections 7, 8 and 9 relate to domestic and foreign corporations having no capital stock and to insurance companies.

"Section 10. Upon the filing of the report and the payment of the fee provided for in sections 1 to 9 of

this act, inclusive, to the Treasurer of State, the Auditor of State shall make out and deliver to the corporation paying, a certificate of the compliance by such corporation with the said sections of this act, and the payment of the annual fee provided for therein. The Auditor of State shall make a report to the commission, or if the commission be abolished by law, then to the Secretary of State, of the annual fee so collected.

"Section 11. The Secretary of State shall prepare and keep a correct list of all corporations subject to the provisions of sections 1 to 9, inclusive, of this act, and engaged in business within the State, and shall on July 1 each year certify a copy of this list to the Arkansas Tax Commission, or to the Secretary of State if the commission be abolished, and shall monthly thereafter file with the commission certified report showing all corporations, the increase or decrease of the capital stock, or the dissolution of existing corporations, and such other information as the commission or Secretary of State, as case may be, may require. For the purpose of obtaining other information, the Secretary of State or the commission shall have access to the records of the offices of the county clerks of the State.

"Section 12. The taxes provided for by this act shall be due and payable on or before August 10 each year. All taxes shall be by the Treasurer of State credited to the general revenue fund. If any corporation refuses to pay on or before the 10th day of August the taxes assessed against it, the Treasurer of State shall certify a list of such corporations so delinquent to the Auditor of State, who shall add to the tax due, a penalty of 25 per cent thereon, and forthwith certify the same to the Attorney General for collection. The Attorney General shall proceed forthwith to collect the same, and the amount so collected shall be paid

into the State treasury and credited to the general revenue fund. Suits for collection of such tax may be brought in the name of the State, or in any other county in which such corporation has its domicile, and if a foreign corporation in the county of its principal place of business."

There are a number of other sections in the act, but it is deemed unnecessary to set them out at this time; and the act was amended in an immaterial respect by a subsequent act of the same General Assembly (*Act No. 313, approved May 26, 1911.*)

The Supreme Court of Arkansas in its opinion held that Act No. 251 provided for the valuation for purposes of taxation of all property belonging to railroad, express, sleeping car, telegraph, telephone and pipe line companies, but that it expressly excepted from said valuation one well-known and thoroughly established element of corporate value—that is to say, the "*right to be a corporation.*" The Supreme Court of Arkansas further held that said Act No. 112 made provision for the valuation of the "*right to be a corporation,*" and for the taxation of that proportion of that value as the property located and used in Arkansas bears to the total value of the property wherever situated and used in the business. In other words, that the two acts taken together provided for the taxation of all the property in Arkansas of a railway corporation, and made provision for the ascertainment of its every element of value, Act No. 112 being expressly

designed for the purpose of placing a valuation upon the "*right to be a corporation,*" commonly referred to as a "franchise." The two acts, taken together and forming a system or scheme of taxation, were sustained as a valid exercise of the State's taxing power and as not violative of any provision of the Federal Constitution.

As thus construed, Act No. 112, under and by virtue of which this suit was instituted, is now before this tribunal to be tested by the Constitution of the United States.

POINTS AND AUTHORITIES.

I.

THE RIGHT OF THE STATE TO EXACT FROM A RAILWAY COMPANY A TAX UPON THAT PORTION OF ITS PROPERTY ACTUALLY WITHIN ITS BORDERS, AND, IN ASSESSING IT FOR THE PURPOSES OF TAXATION, TO TAKE INTO CONSIDERATION ITS VALUE AS A GOING CONCERN AND AS A PART OF A GENERAL SYSTEM EXTENDING OVER SEVERAL STATES, IS THOROUGHLY ESTABLISHED BY THE DECISIONS OF THIS COURT, AND IS NOT INHIBITED BY ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

American Refrigerator Transit Co. v. *Hall*, 174 U. S. 70.

Union Refrigerator Transit Co. v. *Lynch*, 177 U. S. 149.

Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18.

Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.

Western Union Tel. Co. v. *Attorney General*, 125 U. S. 530.

Western Union Tel. Co. v. *Attorney General*, 141 U. S. 40.

Adams Exp. Co. v. *Ohio*, 165 U. S. 194.

Maine v. *Grand Trunk R. Co.*, 142 U. S. 217.

Pittsburg, C. C. & St. L. R. Co. v. *Backus*, 154 U. S. 421.

Cleveland, C. C. & St. L. R. Co. v. *Backus*, 154 U. S. 439.

Indiana Express Company Cases, 165 U. S. 256.

Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150.

Adams Exp. Co. v. *Kentucky*, 166 U. S. 171.

II.

AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, THE TAX HERE INVOLVED IS A LEGAL EXACTION, INTENDED TO REACH AND MAKE AMENABLE TO TAXATION AN ELEMENT OF VALUE WHICH IS A WELL-RECOGNIZED FACTOR IN ASCERTAINING THE FULL VALUE OF CORPORATE PROPERTY, AND WHICH EXPRESSLY HAS BEEN OMITTED FROM TAXATION IN THE GENERAL ENACTMENTS RELATIVE TO THE ASSESSMENT AND COLLECTION OF TAXES UPON PROPERTY OWNED BY RAILWAY CORPORATIONS AND ACTUALLY SITUATED IN THE STATE OF ARKANSAS. AS THUS CONSTRUED, IT IS NOT A BURDEN UPON INTERSTATE COMMERCE NOR UPON THE RIGHT OF THE PLAINTIFF IN ERROR TO ENGAGE IN SUCH COMMERCE, AND IT IS THEREFORE NOT REPUGNANT TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

Maine v. *Grand Trunk R. Co.*, 142 U. S. 217.

United States Exp. Co. v. *Minnesota*, 223 U. S. 335.

Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18.

Western Union Tel. Co. v. *Massachusetts*, 125 U. S. 530.

Pittsburg, etc. R. Co. v. *Backus*, 154 U. S. 421.

Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.

American Refrig. Tr. Co. v. *Hall*, 174 U. S. 70.

Adams Exp. Co. v. *Ohio*, 165 U. S. 194.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.

Western Union Tel. Co. v. *Attorney General*, 145 U. S. 549.

Galveston, H. & S. A. R. Co. v. *Texas*, 210 U. S. 217.

Myer v. *Wells Fargo & Co.*, 223 U. S. 298.

Fargo v. *Hart*, 193 U. S. 490.

Wisconsin & M. R. Co. v. *Powers*, 191 U. S. 379.

III.

IF THE TAX IMPOSED BY ACT No. 112, ACTS OF 1911, BE REGARDED AS A PRIVILEGE, LICENSE OR EXCISE TAX, RATHER THAN AS A TAX UPON PROPERTY, IT IS NEVERTHELESS A VALID EXERCISE BY THE STATE OF ITS RIGHT TO PRESCRIBE THE TERMS AND CONDITIONS UPON WHICH CORPORATIONS MAY TRANSACT AN INTRASTATE BUSINESS WITHIN ITS BORDERS, AND, INASMUCH AS IT IS NOT BASED IN WHOLE OR IN PART UPON INTERSTATE BUSINESS OR UPON PROPERTY BEYOND THE STATE, IT IS NOT VIOLATIVE OF ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES AS AMOUNTING TO A BURDEN UPON INTERSTATE COMMERCE.

Hammond Packing Co. v. *State*, 212 U. S. 322.

American Smelting & R. Co. v. *Colorado*, 204 U. S. 103.

Security Mutual Life Ins. Co. v. *Prewett*, 202 U. S. 246.

Hooper v. *California*, 155 U. S. 648.

Allgeyer v. *Louisiana*, 165 U. S. 578.

Osborne v. *Florida*, 164 U. S. 650.

Pullman Co. v. *Adams*, 189 U. S. 420.

Armour Packing Co. v. *Lacy*, 200 U. S. 226.

Kehrer v. *Stewart*, 197 U. S. 60.

Waters-Pierce Oil Co. v. *Texas*, 177 U. S. 28.

Orient Ins. Co. v. *Daggs*, 172 U. S. 557.

John Hancock Mut. Life Ins. Co. v. *Warner*, 181 U. S. 73.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.

Horn Silver Min. Co. v. *New York*, 143 U. S. 305.

Pembina Con. Silver Min. & Mill Co. v. *Pennsylvania*, 125 U. S. 181.

Home Ins. Co. v. *New York*, 134 U. S. 594.

California v. *Pacific R. Co.*, 127 U. S. 41.

Ashley v. *Ryan*, 153 U. S. 436.

Postal Tel. Cable Co. v. *Charleston*, 153 U. S. 692.

Williams v. *Talladega*, 226 U. S. 404.

Ewing v. *Leavenworth*, 226 U. S. 464.

Barrett v. *New York*, U. S. Adv. Ops. 1913, p. 203.

New York v. *Roberts*, 171 U. S. 658.

Allen v. *Pullman's Palace Car Co.*, 191 U. S. 171.

Flint v. *Stone Tracy Co.*, 220 U. S. 107.

Mills v. *Lowell*, 178 Mass. 459.

Lehigh Valley R. Co. v. *Pennsylvania*, 145 U. S. 192.

Baltic Mining Co. v. *Massachusetts*, U. S. Adv. Ops. 1913, p. 15, 231 U. S. 68.

S. S. White Dental Mfg. Co. v. *Massachusetts*, *Id.*

Philadelphia & So. Mail S. S. Co. v. *Pennsylvania*, 122 U. S. 326.

IV.

THE TAX HERE INVOLVED DOES NOT DENY TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAW, NOR DEPRIVE IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT.

Davidson v. *New Orleans*, 96 U. S. 97.

Merchants Bank v. *Pennsylvania*, 167 U. S. 461.

Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232.

Coulter v. *L., etc. R. Co.*, 196 U. S. 599.

Savannah, etc. R. Co. v. *Savannah*, 198 U. S. 392.

Metropolitan St. R. Co. v. *New York*, 199 U. S. 1.

St. Louis, etc. R. Co. v. *Davis*, 132 Fed. 629.

Barbier v. *Connolly*, 113 U. S. 27.

Magoun v. *Illinois Tr. Sav. Bank*, 170 U. S. 283.

Tennessee v. *Whitworth*, 117 U. S. 129.

Bank of Commerce v. *Tennessee*, 161 U. S. 134.

Home Ins. Co. v. *New York*, 134 U. S. 594.

Baltic Min. Co. v. *Massachusetts*, U. S. Adv. Ops. 1913, p. 15, 231 U. S. 68.

S. S. White Dental Mfg. Co. v. *Massachusetts*, *Id.*

Spencer v. *Merchant*, 125 U. S. 345.

King v. *Portland City*, 184 U. S. 61.

Carson v. *Sewerage Comm'rs of Brockton*, 182 U. S. 398.

Williams v. *Eggleston*, 170 U. S. 304.

ARGUMENT.

I.

THE RIGHT OF THE STATE TO EXACT FROM A RAILWAY COMPANY A TAX UPON THAT PORTION OF ITS PROPERTY ACTUALLY WITHIN ITS BORDERS, AND, IN ASSESSING IT FOR THE PURPOSES OF TAXATION, TO TAKE INTO CONSIDERATION ITS VALUE AS A GOING CONCERN AND AS A PART OF A GENERAL SYSTEM EXTENDING OVER SEVERAL STATES, IS THOROUGHLY ESTABLISHED BY THE DECISIONS OF THIS COURT, AND IS NOT INHIBITED BY ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

It is academic that the State has the power to levy a tax upon all property within its borders, and the mere fact that that property is employed in interstate commerce is no reason why the State's taxing power may not be exercised over it. All property within the confines of a State may be subjected to the burdens of State Government, and may be required by the laws of that State to contribute its just quota to the expenses of Government. And this is true of every species of property, regardless of the use to which it is put. No one will undertake to deny this assertion. The property of an interstate carrier in the State of Ark-

ansas is subject to taxation to the same extent as is the property of a local carrier in the same State and in the same taxing district; and the imposition by a State of a tax upon the property of an interstate carrier, although all of that property might be employed for no other purpose save that of commerce between the States, is not in any sense of the word a burden upon interstate commerce. We will not stop long enough to cite authorities upon so thoroughly established a proposition.

Not only has the State the right to levy a tax upon the property of an interstate carrier, but in fixing the value of that property for purposes of taxation, the State is not required to confine itself to the isolated pieces of property situated in the State, regardless of their connection with property situated elsewhere, but she has the right, under the decisions of this court, to adopt a "unit rule" for purpose of valuation, and to consider the property within the State as a part and parcel of a general system or profit-producing plant, although other parts of that system or plant may exist in other States.

In *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, the taxed carrier was a foreign corporation which operated refrigerator cars in the carriage of freight from places in Colorado to places outside of that State, from places outside of the State to places within it, or between places wholly outside of the State.

These cars were never run in fixed numbers or at regular times or as regular parts of freight trains. It neither owned nor leased a railroad, but paid the railroads for transporting its cars. It did no other business in the State than that described, and had no office or property other than the cars. The average number of its cars in the State during the year was forty. The State laid a tax upon the company, basing such tax upon the assessed value of the said average number of cars in the State. This court said that the tax was valid, and was not an interference with interstate commerce.

In *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, the facts were like those in the case just discussed, except that it did not appear in the record before the court what the average number of cars used in the State was. The tax, which was assessed upon a valuation of ten cars, was upheld, this court saying that in the absence of proof that the assessment was unreasonable, unequal or unjust, or that the method of valuation was erroneous, the "presumption is that the action of the taxing officers was correct and regular."

In *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, this court sustained a tax on a corporation running cars in the State in a similar manner to that described in the cases just discussed. The tax in this instance was on the company's capital stock, taking as

a basis of assessment such proportion of the capital stock as the number of miles of railroad over which cars were run in the State bore to the whole number of miles over which cars were run.

In *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, there was involved a statute of the State of Indiana providing for the taxation of telegraph companies. The valuation in this case was to be found by fixing the value of the shares of the company's stock and then, by levying a tax upon that proportion of the value so found as the length of the telegraph lines in the State bore to the total length of the telegraph company's lines everywhere. Mr. Justice Gray, who delivered the opinion of this court, said:

"It is not and can not be doubted that each State of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the National Government are not interfered with" (citing many cases).

In discussing the contention that the act was a burden upon interstate commerce, the court had occasion to cite and quote from the two cases of *Western Union Telegraph Co.* v. *Attorney General*, 125 U. S. 530, and 141 U. S. 40. The cases last cited were from Massachusetts, and involved the constitutionality of the Massachusetts statutes, which required the telegraph company to return annually to the tax commission a statement of the amount of its capital stock,

together with its par value and the market value of its shares, also the locality and value of its real estate and machinery subject to local taxation within the State. The return was also to show the whole length of its lines, and the length of so much of its lines as was within the State. The corporation was required to pay annually "a tax upon its corporation franchise at a valuation thereof equal to the aggregate value of the shares of its capital stock," as so determined by the tax commission; deducting, however, from that valuation, such proportion thereof as was proportional to the length of that part of its line lying without the State, and also an amount equal to the value of its real estate and machinery within the State and subject to local taxation therein under other laws.

In the case of *Western Union Telegraph Co.* v. *Taggart, supra*, this court held that the statute of Indiana, which provided for the valuation of a tax upon the capital stock, such valuation to be proportioned according to the mileage, was not a burden upon interstate commerce, but was a valid enactment.

In the case of *Pullman's Palace Car Co.* v. *Pennsylvania, supra*, the court held that in the case of an interstate carrier of passengers, not owning or operating lines of its own, but operating cars over the lines of railroads both within and without the State, such carrier could not complain at the payment of a tax upon such proportion of the value of its capital stock

as the number of miles of railway over which its cars were run in the State bore to the whole number of miles over which its cars were operated.

In *Adams Express Co.* v. *Ohio*, 165 U. S. 194, Mr. Chief Justice Fuller, who delivered the opinion, used the following appropriate language:

"As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction."

In support of this language, the learned Chief Justice cited the following decisions of this court:

Western Union Tel. Co. v. *Massachusetts*, 125 U. S. 530.

Massachusetts v. *Western Union Tel. Co.*, 141 U. S. 40.

Maine v. *Grand Trunk R. Co.*, 142 U. S. 217.

Pittsburg, C. C. & St. L. R. Co. v. *Backus*, 154 U. S. 421.

Cleveland, C. C. & St. L. R. Co. v. *Backus*, 154 U. S. 439.

Western Union Tel. Co. v. *Taggart*, *supra*.

Pullman's Palace Car Co. v. *Pennsylvania*, *supra.*

Further in the opinion, after quoting with approval from the opinion of Judge Lurton (*Sanford* v. *Poe*, 37 U. S. App. 395), Chief Justice Fuller used the following language:

"The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several States through which a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

The case last cited was followed and made the basis for the decision in the *Indiana Express Company Cases*, 165 U. S. 256. It was also cited with approval in the case of *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; and again in the case of *Adams Express Co.* v. *Kentucky*, 166 U. S. 171.

The decisions above referred to, and others which might be cited, fully establish the proposition that the State may tax the property of a railroad corporation, although it is employed in interstate commerce, and that in fixing the value for purposes of taxation, it may do so in accordance with the "unit rule," and, after ascertaining the entire value of the company's property, both in the State and elsewhere, may assess a just proportion of that total value as taxable. This

is the method which States have adopted to reach what is known as the "corporate excess"—that added value about which Mr. Justice Holmes speaks in the case of *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217.

There can be no question, under the decisions of this court, but that the State of Arkansas has the right to tax the property of the plaintiff in error, and, in fixing the value of that property, to consider it as a part and parcel of an entire profit-producing plant; and as long as the division of the value is fair and just, the plaintiff in error can not complain. The State in this case has attempted to proportion the value of the franchise—that is to say, "*the right to be a corporation*"—according as the actual value of the property owned and used in business in Arkansas bears to the value of all the property wherever owned and used. We shall undertake to show, at another point in this argument, that such proportion is just and correct, and is in no sense arbitrary or unreasonable.

Other cases sustaining the proposition we have been discussing will be referred to and quoted from in the succeeding subdivision of this brief.

II.

AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, THE TAX HERE INVOLVED IS A LEGAL EXACTION, INTENDED TO REACH AND MAKE AMENABLE TO TAXATION AN ELEMENT OF VALUE WHICH IS A WELL-RECOGNIZED FACTOR IN ASCERTAINING THE FULL VALUE OF CORPORATE PROPERTY, AND WHICH EXPRESSLY HAS BEEN OMITTED FROM TAXATION IN THE GENERAL ENACTMENTS RELATIVE TO THE ASSESSMENT AND COLLECTION OF TAXES UPON PROPERTY OWNED BY RAILWAY CORPORATIONS AND ACTUALLY SITUATED IN THE STATE OF ARKANSAS. AS THUS CONSTRUED, IT IS NOT A BURDEN UPON INTERSTATE COMMERCE NOR UPON THE RIGHT OF THE PLAINTIFF IN ERROR TO ENGAGE IN SUCH COMMERCE, AND IT IS THEREFORE NOT REPUGNANT TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Arkansas, in construing Acts Nos. 112 and 251 of the Acts of 1911, held that the two acts should be taken together as prescribing a complete scheme for the taxation of railroad corporations. Referring to Act No. 112, the Supreme Court of

Arkansas said (*Ark. Law Reporter, vol. 33, No. 5, p. 332; Record, pp. 36, 37*):

"In the passage of the act in question, no doubt the Legislature had in mind the fact that the right or privilege to be or exist as a corporation, although a matter of value to the stockholders of the corporation, is not an asset of the corporation and transferrable as such, and that its value can not under ordinary rules be ascertained for the purpose of taxation as property, but since it is a privilege or right granted by the State, a franchise tax may be imposed upon this right or privilege for the purpose of raising revenue. We think it plain, then, under our Constitution and decisions, that the act in question is valid unless it be held to be a burden upon interstate commerce."

The court then discusses the act with reference to the commerce clause of the Constitution of the United States, and reaches the conclusion that it is in no sense a burden upon interstate commerce, but that it comes squarely within the rule announced by this court in the case of *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217. The court then quoted at length from the opinion of this court in *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, where it was said that:

"The State must be allowed to tax the property and to tax it at its actual value as a going concern. * * * When a Legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by *taking the whole scheme of taxation into account.*"

In the opinion in *U. S. Express Co.* v. *Minnesota*, *supra*, from which the above quotation was made by

the Arkansas Supreme Court in the opinion in this case, reference is made to the judgment of this court in the case of *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, and it was said:

"In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent, or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the State court and the argument on behalf of the State that another tax on the property had already been levied, *covering its full value as a going concern.*"

It was also said in the part of the opinion quoted by the Supreme Court of Arkansas below that the statute of Oklahoma was condemned in the case of *Oklahoma* v. *Wells Fargo & Co.*, 223 U. S. 298, for the same reason.

The Supreme Court of Arkansas, in construing the acts in question, in the course of its opinion said, further:

"In the case at bar the gross receipts from all sources of the railway company have not been used as a means for ascertaining the value of the property in the State. By the express provision of Act No. 251, it was enacted for the purpose of providing the manner for assessing for taxation the property of railroad companies the right to be or exist as a corporation was expressly excluded from the items which go to make up the value of the property of the corporation. As we have already seen, the right or privilege to be or exist as a corporation is the subject of taxation, and this right or privilege is not considered in fixing the value of the property of corporations under Act No. 251, the general tax act. Our State has fixed a fran-

chise tax based solely 'upon the proposition of outstanding capital stock of corporations represented by property owned and used in business transacted in this State.' The act in question seems to have been drawn with great care and with the evident purpose of excluding any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of *Ludwig* v. *Western Union Tel. Co., supra*, and the *Western Union Tel. Co.* v. *Kansas, supra*, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so."

So it is seen that the acts of Arkansas, as construed by the Supreme Court of that State, form a complete system or scheme of taxation for railroad corporations. Act No. 251 provides for the valuation of their property in that State, and designates the various items that shall be considered in making up that value; denominates the various factors which shall be taken into account. Section 1 of Act No. 251, and section 2 of the same act expressly provide that "*the right to be a corporation*" shall not be considered by the tax commission in ascertaining the value of the railroad property in Arkansas for purposes of taxation, when the State Tax Commission is proceeding under said Act No. 251. The exception is couched in language too clear to be misunderstood; and when we come to see that the same Legislature in a previous act had made provision for the valuation of this "*right to be a corporation,*" we understand why the exception in Act No. 251. Taking the two acts together, we have a complete scheme outlined for ascertaining the

total value of all corporations doing business in Arkansas, including railroad corporations engaged in interstate commerce.

Section 4 of Act No. 112 provides that corporations shall be subject to all other provisions of law; and section 6 of the act provides for the payment of tax of one-twentieth of one per cent on that proportion of the outstanding capital stock which is represented "*by property owned and used in business transacted in this State.*" Taking the two acts as forming an entire system or scheme, we find that the tax commission is required, in valuing the property of railroad companies for general taxation, to *eliminate* from said valuation any increase therein which might be occasioned by the general franchise granted by the State, which is the right to do business within her borders as a corporation. The tax commission, after having arrived at the value of the property, exclusive of this item, is then directed how it shall proceed in order properly to ascertain the value of that item of property value. That is done by taking the entire value of all the property of the railroad company as ascertained under Act No. 251, and finding the value of that part of the property situated in Arkansas. When this is done, we have two of the terms of the proportion which Act No. 112 outlines. Stating it in the usual formula, we have the following:

The value of the property of the corporation situated in Arkansas, as ascertained under Act No. 251, is to the whole value of all of the property of the corporation, as ascertained under Act No. 251, as the amount of the capital stock represented by the property in Arkansas is to the entire capital stock.

When this proportion is reduced to its simplest terms, the percentage of one-twentieth of one per cent is applied to the result, and this gives, according to the statute, the value which the State of Arkansas has placed upon "*the right to be a corporation,*" and to transact business as a corporation within her territorial limits.

We do not think it can be doubted that the construction which the Supreme Court of Arkansas has placed upon these acts is the proper construction.

So far as the Federal Constitution is concerned, there is nothing in it which precludes the State from adopting any plan she sees fit for the purpose of arriving at valuation, so long as that plan operates equally and uniformly upon all persons in the same class, and so long as it does not operate as a burden upon commerce between the States. The acts in question apply to all corporations, foreign and domestic. And Act No. 112 is carefully drawn so that no complaint may be made that interstate commerce is burdened thereby. The tax is based primarily *upon property actually within the State of Arkansas.* Although

the percentage is applied to a proportion of the outstanding capital stock at par, the tax upon the capital stock is no more and no less than a tax upon the property of the corporation.

In *Pullman's Palace Car Co.* v. *Pennsylvania, supra,* Mr. Justice Gray, speaking for this court, said (p. 36):

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business in the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, *in substance and effect, a tax on that property.*"

And further on in the course of the opinion, the learned Justice said:

"The mode which the State of Pennsylvania adopted, to ascetrain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

"The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the circuit courts of the

United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the State courts, to questions under the Constitution and laws of the United States."

In *Western Union Tel. Co.* v. *Massachusetts*, *supra*, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company on account of property owned and used by it within the State, taking as a basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

That a tax upon the capital stock of a corporation, proportioned according to the value of the property within the State, is valid, is also established by the following decisions:

Pittsburg, etc., R. Co. v. *Backus*, *supra*.

Western Union Tel. Co. v. *Taggart*, *supra*.

American Refrigerator Transit Co. v. *Hall*, *supra*.

In *Adams Express Co.* v. *Ohio*, *supra*, syllabus 5 reads as follows:

"Taxation on or determined by the proportion of the capital of an express company employed in a State through which its business is carried on, fairly ascertained, is essentially a property tax, and, as such, not an interference with interstate commerce."

In the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, the statute of Kansas was con-

demned by this court because the tax was levied upon *all of its authorized capital*, this court saying, through Mr. Justice Harlan that a tax

"* * * of a given per cent of its authorized capital, representing, *as that capital clearly does, all of its business and property, both within and outside of the State*, as a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a *burden and tax* on the company's interstate business and *on its property located or used outside of the State*. The express words of the statute leave no doubt as to what is the basis on which the fee specified in the State statute rests. That fee, plainly, is not based on such of the company's capital stock *as represented in its local business and property in Kansas*. The requirement is a given per cent of the company's authorized capital; that is, all its capital, wherever and however employed, whether in the United States or in foreign countries. * * * What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a condition of the telegraph company's right to transact purely local business in Kansas that it shall contribute, for the benefit of the State school fund, a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere."

The intimation in the language above quoted is unmistakable. If the Kansas tax had been levied only on that proportion of the capital stock represented by property in Kansas, an entirely different question would have been presented—a question which, as we see it, has been concluded by the decisions of this court.

In the case last above cited and quoted from, Mr. Justice Harlan, in commenting upon the case of *Western Union Tel. Co.* v. *Attorney General*, 145 U. S. 549, said that in that case—

"A tax nominally upon the shares of the capital stock of the company was held to be in effect a tax only on property owned and used by the company in Massachusetts, because, and *only because*, the basis established for the ascertainment of the value of such property was *the proportion of the company's lines in the State to their entire length throughout the whole country*. Such a tax was held not to be forbidden by the Constitution, because *based* on the company's stock representing only its business and its property inside the State." (*Italics* are not ours.)

It is not to be doubted that a tax based upon the capital stock, represented by the property in Arkansas, is nothing more nor less than a tax upon that property; and as such it must be sustained.

The statute provides for the payment of a tax on the franchise, or right to be a corporation, which is an element of value properly to be taken into consideration by the taxing authorities in valuing, as a going concern, the property of the corporation.

A corporation may be the recipient of many franchises, such as franchises granted by municipalities as well as by the State, rights and privileges to cross public bridges, to cross public lands, to exercise the power of eminent domain, and a thousand-and-one other items which might be thought of. All of these rights and privileges are to be taken into considera-

tion in arriving at the value of the property under Act 251, *save and except* the specific franchise which consists in the "*right to be or exist as a corporation.*" The word "franchise" is a generic term, and includes all grants and privileges from the sovereign; and all these franchises are to be considered as adding value to the physical property, under Act 251, *except* "*the right to be a corporation;*" and the added value which this gives the property is to be ascertained under Act 112.

This court is not concerned with the reasons which prompted the Legislature of Arkansas in providing for the valuation of "*the right to be a corporation*" in this manner and in excepting it from the general property tax and making it subject to a specific tax. That is a question which addresses itself to the Legislature primarily, and afterward to the Supreme Court of the State. That court has sustained it as a constitutional exercise of the legislative power. So far as the State Constitution is concerned, the question is now closed. It has been finally determined that the ascertainment of this element of value in the manner provided by the statute is warranted and sanctioned by the Constitution of Arkansas. The question before this court is whether or not interstate commerce has been burdened in so doing; and this is a question of comparatively easy solution, as we regard it as controlled by previous decisions of this court.

The tax is a tax upon an added element of property values, and it is immaterial that a part of the property, which is represented by the taxable proportion of the capital stock, is used in interstate commerce. The authorities cited *supra* conclusively establish this proposition. As we have seen, the tax upon the capital stock is in effect a tax upon the property of the corporation in this State; and it is immaterial that that property is used in interstate commerce, so long as only that part of the property which is in the jurisdiction of the State is made the basis for the tax—or, what amounts to the same thing, so long only as that portion of the capital stock as is represented by property actually in the State is made the basis for the tax.

As thus considered, the tax would be constitutional, even though the entire business of the carrier was interstate. Its franchise to be or exist as a corporation in Arkansas having value as property, intangible in its nature yet valuable nevertheless, enhances the value of its physical properties in the jurisdiction of the taxing State; and that State having a right, under the decisions of this court, to compute its value after the "unit rule," was acting within its powers when it prescribed that this added element of value should be taxed for the support of the general State Government. This is the sort of tax approved in *Maine v. Grand Trunk R. Co., supra*, where the following language was used:

"A State statute which requires every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States, and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the State, is one within the power of the State to levy."

In considering the case of *Maine* v. *Grand Trunk Ry. Co., supra*, the attention of the court is directed to the comments upon that case in the opinion of Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217. In commenting upon that decision, the learned Justice says:

"Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxes as a going concern. In *Wisconsin & M. R. Co.* v. *Powers, supra*, the measure of property by income purported only to be *prima facie* valid. But the extreme case came earlier. In *Maine* v. *Grand Trunk R. Co., supra*, 'an annual excise tax for the privilege of exercising its franchise' was levied upon every one operating a railroad in the State, fixed by percent-

ages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State, when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company case.* But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right-of-way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax." (*Citing many cases.*)

The real reason the Texas statute was disapproved in this case (210 U. S. 217), was because the *full value* of the property in Texas was taxed under other laws, and the statute under review did not undertake to provide for the taxation of an *expressly omitted element* of value, nor for a privilege tax, but was a tax *directly upon the receipts from interstate commerce.* It will be remembered that in that case the tax was levied directly upon the gross receipts of the carrier, and the larger part of those receipts was derived from the carriage of passengers and freight coming from or destined to points without the State.

In the case of *Myer* v. *Wells Fargo & Co.*, 223 U. S. 298, a statute of Oklahoma was under considera-

tion which provided for the payment of a "gross revenue tax," which should be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation," equal to such proportion of a specified percentage of its gross receipts from every source whatsoever as the portion of its business done within the State bore to the whole of its business. This court held that, as applied to a nonresident express company whose receipts were largely derived from interstate commerce and from investments in bonds and lands outside of the State of Oklahoma, the act was void as a burden upon interstate commerce. Mr. Justice Holmes wrote the opinion in this case, and an examination of that opinion will show that there is nothing said therein which militates against the application of the doctrine in the case of *Maine* v. *Grand Trunk Ry. Co., supra,* to the instant case.

In that case the tax was based upon the proportion of the business done within the State to the entire business of the company. This court held that the Oklahoma statute could not be construed as a tax upon property, because all the property was taxable at its full value under other statutes. That tax was a tax directly upon a portion of the receipts derived from interstate commerce, and is clearly distinguishable from the tax involved in the case at bar. It was also a tax upon the income from property in other States and not used in the express business. The court

said that it could not be supposed that this statute was intended "to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above, on the authority of *Fargo* v. *Hart*, *infra*, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State."

In *Fargo* v. *Hart*, 193 U. S. 490, which was made the basis for the opinion in the Oklahoma case just quoted from, there was involved the action of the taxing authorities of Indiana, and it was held by this court that, in treating the whole business of the express company as a unit, and assessing the company on the proportion of the total value of its property determined by the ratio of mileage, the taxing authorities had no right to include something like fifteen and a half million dollars' worth of personal property, and two million dollars' worth of real property, outside of the State of Indiana, which was *not used in the express business*. This court held that the authorities of Indiana were not justified in doing this, and Mr. Justice Holmes, who also wrote the opinion of the court in this case after recognizing the right of the State to estimate the value after the "unit rule," denied that that rule might be so extended as to take into consideration property outside of the jurisdiction of the taxing State and *actually not used in the business*,

a part of which was transacted in the State; and it was shown that the division, according to the mileage basis, while probably *prima facie* fair and just, would not be the proper method of division in every instance. The *Express Company cases* in 154 U. S. were cited and commented upon, and it was said that the principle adopted by the board was wrong. That "it involved an attempt to tax property beyond the jurisdiction of the State and to throw an unconstitutional burden on commerce among the States."

In the case of *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, it was held (quoting second syllabus) that:

"No unconstitutional interference with interstate commerce is made by Michigan act of June 4, 1897, levying a specific tax upon the property and business of any railroad corporation operated within the State and providing that 'when the railroad lies partly within and partly without this State, *prima facie* the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried.'"

Discussing the question as to whether or not the tax imposed by the State of Michigan was a burden upon interstate commerce, Mr. Justice Holmes, speaking for the court, said:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (etc.) See also *Western U. Tel. Co.* v. *Taggart*, 163 U. S. 1 (etc.)."

The Michigan act approved in this case provided for a "specific tax upon the property and business of every railroad corporation operated within the State," and that for the purposes of taxation there should be added to the actual earnings of the road on account of the receipts from local business only that proportion of the receipts from interstate business as the length of the road over which said interstate business was carried in the State bore to the entire length of the road over which the interstate business was carried. A portion of the receipts from interstate commerce was actually taxed under the Michigan law.

The tax imposed by the Legislature of Arkansas, which is now before this court for review, is not nearly as close to the constitutional barrier as was the Michigan tax, sustained by an undivided court.

In the case of *United States Express Co.* v. *Minnesota*, 223 U. S. 335, there was involved the validity of a statute of Minnesota providing for the payment of a property tax upon the gross earnings of express companies. Mr. Justice Day, who delivered the opinion of this court, briefly stated the substance of the Minnesota enactment as follows:

"The law in question (Revised Laws of Minnesota, 1905, chapter 11), provides for the taxation of express

companies. Section 1013 of the act requires every express company doing business in the State, between January 1 and February 1, to file with the State Auditor, in such form as he may prescribe, a statement, duly verified, showing the entire receipts, including all sums earned or charged, whether received or not, for business done within the State, including its proportion of gross receipts for business done in the State by such company in connection with other companies. The statement must further show the amount actually paid by such express company to the railroads within the State for the transportation of its freight for the year, giving the amount paid to each railroad company; and also show the entire receipts of the company for business done within the State, including its proportion of gross receipts for business done within the State in connection with other companies, after deducting the amounts paid for transpartation to railroads within the State. Section 1015 provides that the Auditor shall annually, between March 1 and April 1, ascertain the gross receipts of such company by deducting the sums thus annually paid by it for the transportation of freight within the State from its entire receipts for business done in the State, including its proportion for business done within the State in connection with other companies. Section 1019 provides that annually, on or before March 15, the Auditor shall assess upon each company a tax of 6 per cent upon its gross receipts for business done in the State for the preceding calendar year, as determined by the Auditor, which shall be in lieu of all taxes upon its property, and shall deliver to the State Treasurer for collection a draft upon the company for such sum."

After citing the cases which deny the right of a State by its taxing laws to burden interstate commerce, the opinion proceeds:

"While we have no disposition to detract from the authority of these decisions, this court has also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the State by receipts which came in part from business of

an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.

"In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, this court sustained a tax which required every railroad operated within the State to pay an annual tax for the privilege of exercising its franchises therein, determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the State, such gross receipts being derived from its entire business, state and interstate. The resort to the gross receipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the State."

After citing and quoting from the opinion in the case of *Wisconsin & M. R. Co.* v. *Powers*, *supra*, the following language is used:

"A question in principle not unlike the one here presented, came before this court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. * * * In that case it was contended that the income of the corporations sought to be taxed under the Federal law included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court that, where the tax was within the legitimate authority of the Federal Government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power, and to measure a legitimate tax by income derived, in part, at least, from the use of such property."

The opinion, at another point, quotes the language of Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v.

Texas, supra, where he adopts the language in the previous case of *Postal Tel. Cable Co.* v. *Adams,* 155 U. S. 688, which is as follows:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, *ascertained by reference thereto,* it is not open to attack as inconsistent with the Constitution."

Further, referring to the case of *G., H. & S. A. R. Co.* v. *Texas, supra,* Mr. Justice Day says:

"In that case the statute of Texas was condemned, because it appeared to the court to be an attempt to reach the receipts from interstate commerce by a tax of one per cent, or what was equal to the same thing, on gross receipts arising from such commerce, when it appeared from the judgment of the State court and the argument on behalf of the State that another tax on the property had already been levied, covering its full value as a going concern. The tax under consideration was held to be merely an effort to reach the gross receipts, not disguised by the name of an occupation tax, or in any way helped by the words 'equal to.'

"Upon like reasoning the statute of Oklahoma was condemned in the case of *Mayer* v. *Wells Fargo & Co.,* decided today."

The opinion then proceeds to distinguish the tax imposed by Minnesota from the taxes held invalid in the Taxes case and in the Oklahoma case, upon the grounds heretofore mentioned, towit: that in the Texas and Oklahoma statutes the property of the corporation had been taxed at its full value under other statutes. The court then said:

"The tax in the present case is not like those held invalid in the *Galveston case* and the *Oklahoma case*, being in addition to other State taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of inserstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania, supra*), but as in the *Maine case*, was an attempt to measure the amount of tax within the admitted power of the State by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this court in *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194 * * * to sustain a tax upon the property of an express company, which property was considered a part of one money-earning organization extending through many states."

The opinion concludes with the following significant language:

"Upon the whole, we thing the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State."

The Arkansas statute is further from the danger line than was the Minnesota law.

Before leaving this question, we desire again to call the court's attention to the case of *Maine* v. *Grand*

Trunk R. Co., supra. There the tax was laid by ascertaining the whole gross receipts of the road, dividing the result by the whole number of miles of the road, and then by multiplying the quotient by the number of miles in the State, to ascertain the amount of the gross receipts upon which the tax should be estimated. The law applied to both domestic and foreign corporations, and the tax was expressed to be "an annual excise tax for the privilege of exercising its franchises in the State." The tax was held to be not an interference with interstate commerce. The right of the State to tax as property the privileges granted the corporation was clearly affirmed; and it was said that the resort to the gross receipts was only had to ascertain the value of the business done, and thus obtain a guide as to the amount of the tax to be levied. The court said:

"We are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce, which consists in such transportation."

This case seems to us conclusive of the case at bar, and as conclusive of the question raised by plaintiff in error. The only difference is this: Whereas in the Maine case the gross receipts were proportioned according to the mileage of the railway company, in this case the Arkansas statutes proportion the value of the company's property according to mileage, and provides that

after the proportionate value is ascertained, that the same proportion of the outstanding capital stock shall be subjected to the tax of one-twentieth of one per cent. The case of *Maine* v. *Grand Trunk R. Co., supra*, has been repeatedly cited and approved in later decisions of this court, and its authority has never been questioned or modified. The explanation given to the opinion filed in that case, which will be found in Mr. Justice Holmes' opinion in the case of *G., H. & S. A. R. Co.* v. *Texas, supra*, does not militate against, but strengthens it as an authority in support of the constitutionality of the Arkansas statutes, which, taken as a whole, imposes a legitimate tax upon property, or, as Mr. Justice Holmes expressed it, the two taxes together making a commutation tax, which is a just equivalent for a property tax.

The case of *Maine* v. *Grand Trunk R. Co., supra*, has been cited and approved in the following cases:

Ficklin v. *Shelby Co.*, 145 U. S. 23 (1892).

Postal Tel. Co. v. *Adams*, 155 U. S. 699 (1895).

Erie R. R. v. *Pennsylvania*, 158 U. S. 440 (1895).

Hanley v. *K. C. So. Ry.*, 187 U. S. 621 (1903).

Wisconsin & Mich. Ry. Co. v. *Powers*, 191 U. S. 388 (1903).

Mich. Cent. Ry. v. *Powers*, 201 U. S. 296 (1906).

G., H. & S. Ry. v. *Texas*, 210 U. S. 224 (1908).

Ashley v. *Ryan*, 153 U. S. 446 (1894).

Pittsburg, etc. Ry v. *Backus*, 154 U. S. 431 (1894).

Fargo v. *Hart*, 193 U. S. 490.

Flint v. *Stone Tracy Co.*, 220 U. S. 165.

Myer v. *Wells Fargo & Co.*, 223 U. S. 298.

U. S. Exp. Co. v. *Minnesota*, 223 U. S. 335.

Hooper v. *California*, 155 U. S. 652.

Western Union Tel. Co. v. *Taggart*, 163 U. S. 21.

Adams Exp. Co. v. *Ohio*, 165 U. S. 220.

Baltic Min. Co. v. *Massachusetts*, U. S. Adv. Op., 1913, p. 15.

In the case at bar, Act No. 251 provides for the assessment of the property of railroad corporations where the property is actually situated in the State; and it *expressly provides* that in determining the value to be given that property for purposes of taxation, that the "*right to be a corporation*" shall not be considered. Why this express omission of a well-recognized element of value, an element which properly can be considered by the State in the taxation of corporations? The answer is not far to find. Because the same Legislature which passed the act providing for the valuation of the prop-

erty of railroads and for the assessment thereof, according to such valuation—the act which expressly excepts a known element of value—that same Legislature also passed another act, Act No. 112, under which this suit was instituted; and in that act the law-making power of Arkansas laid down the rule for ascertaining this particular element of value which it had seen fit to exclude in the determination of the value of the property of the railroad company for purposes of general State, county and municipal taxation. The two statutes taken together provide for the taxation of all the property of railroads, and for the proper ascertainment of all its elements of value.

In Act 251 povision was made for local taxation and for the valuation of the property for that purpose. In the other act, one omitted element of value in the general taxation act is considered, and a perfectly fair, reasonable and approved plan is prescribed for ascertaining this element; and the tax derived therefrom is required to be payable for the support of the general State Government.

Thus, taking the two acts together, the Arkansas Legislature has produced the situation to which Mr. Justice Holmes alluded in the opinion in *Galveston, H. & S. A. R. Co.* v. *Texas, supra*, when, in discussing the decision in *Maine* v. *Grand Trunk R. Co., supra*, he said:

"In *Maine* v. *Grand Trunk R. Co., supra*, 'an annual excise tax for the privilege of exercising its franchise' was levied upon everyone operating a railroad in the

State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State, when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Co. case.* But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right-of-way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a cummutation tax."

Thus far we have been concerned with the consideration of the tax imposed by Act 112, upon the theory that the construction placed upon it by the Supreme Court of Arkansas is the correct one, and that the tax imposed by the two acts taken together amounted to no more and no less than a tax upon all the property of the railroad company in Arkansas, the value of which is to be ascertained according to approved standards. We believe that the construction of the Supreme Court of Arkansas upon this point is binding upon this court, and in support of that belief we are content to cite without discussion the following decisions of this court:

Pabst Brewing Co. v. *Crenshaw*, 198 U. S. 17.

Cargill Co. v. *Minnesota*, 180 U. S. 452.

Delamater v. *South Dakota*, 205 U. S. 93.

Atlantic Coast Line Ry. Co. v. *Mazursky*, 216 U. S. 122.

Hammond Packing Co. v. *State of Arkansas*, 212 U. S 322.

Armour Packing Co. v. *Lacey*, 200 U. S. 226.

Kahrer v. *Stewart*, 197 U. S. 60.

Pullman Co. v. *Adams*, 189 U. S. 426.

Osborne v. *Florida*, 164 U. S. 650.

This court might differ with us on this proposition, and it might differ with the Supreme Court of Arkansas as to the proper construction to be given the acts here involved. It might come to the conclusion that the tax provided for by Act No. 112 is not a tax upon property, but is a privilege or license tax. It will be our purpose in the succeeding section of this argument to discuss the statute from that viewpoint, assuming that the tax imposed thereby was not a tax upon property, but was a privilege, excise or license tax. So far as its constitutionality is concerned, we deem it immaterial what it is called .Construed either as a tax upon property or as a privilege, excise or license tax, it is equally free from constitutional objections. So it matters not what name it may take, or what classification it may join. The final result must be the same: Interstate commerce is not burdened by its imposition.

III.

IF THE TAX IMPOSED BY ACT 112, ACTS OF 1911, BE REGARDED AS A PRIVILEGE, LICENSE OR EXCISE TAX, RATHER THAN AS A TAX UPON PROPERTY, IT IS NEVERTHELESS A VALID EXERCISE BY THE STATE OF ITS RIGHT TO PRESCRIBE THE TERMS AND CONDITIONS UPON WHICH CORPORATIONS MAY TRANSACT AN INTRASTATE BUSINESS WITHIN ITS BORDERS, AND, INASMUCH AS IT IS NOT BASED IN WHOLE OR IN PART UPON THE RECEIPTS FROM INTERSTATE BUSINESS OR UPON PROPERTY BEYOND THE STATE, IT IS NOT VIOLATIVE OF ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES, AS AMOUNTING TO A BURDEN UPON INTERSTATE COMMERCE.

It is now settled beyond question that the State has plenary power to prescribe such terms as pleases it, upon which foreign corporations may enter and do intrastate business within its borders. It is now no longer open to question that it has power to refuse admission to a foreign corporation where such corporation desires admission for the purpose of doing an intrastate business; and, having the power to refuse admission, it includes therein the power to prescribe the terms upon which the foreign corporation may be

allowed to do an intrastate business. Since the decision of this court in the *Kansas cases* (216 U. S.), it would seem that this power of the State has one limitation, and only one, and that is that the conditions must not operate so as to conflict with any rights secured by the Constitution of the United States; and this limitation was not announced in the *Kansas cases*, and followed in the subsequent cases of *Ludwig* v. *Western Union*, 216 U. S. 151, and *Western Union* v. *Andrews*, 216 U. S. 165, without much debate and by a closely divided court. And it seems to us that the decision in the *Kansas cases* has been quite materially modified by the very recent cases of *Baltic Mining Co.* v. *Massachusetts*, and the *S. S. White Dental Mfg. Co.* v. *Massachusetts*, U. S. Adv. Op. 1913, p. 15, decided by this court on November 3, 1913. We will have occasion later on in the argument to again refer to these cases, and to what seems to us at least a partial departure from the doctrine of the *Kansas cases*.

It is, however, thoroughly established that the State's right to regulate the terms and conditions upon which foreign corporations may do a purely local business can not be questioned unless the regulations in some way conflict with the Federal Constitution.

Hammond Packing Co. v. *State*, 212 U. S. 322.

American Smelting & R. Co. v. *Colorado*, 204 U. S. 103.

Security Mutual Life Ins. Co. v. *Prewett*, 202 U. S. 246.

Hooper v. *California*, 155 U. S. 648.

Allgeyer v. *Louisiana*, 165 U. S. 578.

Osborne v. *Florida*, 164 U. S. 650.

Pullman Co. v. *Adams*, 189 U. S. 420.

Armour Packing Co. v. *Lacy*, 200 U. S. 226.

Kehrer v. *Stewart*, 197 U. S. 60.

Waters-Pierce Oil Co. v. *Texas*, 177 U. S. 28.

Orient Ins. Co. v. *Daggs*, 172 U. S. 557.

John Hancock Mut. Life Ins. Co. v. *Warner*, 181 U. S. 73.

It may prescribe as such condition a forfeiture of its right to do business upon removal of a cause to the Federal court or the bringing of suit in the Federal court without the consent of the opposite party.

Security Mut. Life Ins. Co. v. *Prewett*, 202 U. S. 246.

Doyle v. *Continental Ins. Co.*, 94 U. S. 535.

This court has had occasion many times to consider the validity, from a constitutional standpoint, of taxes imposed by the States upon corporations for the privilege of doing local business within the State making the imposition. In a majority of the instances, the tax has been sustained. We will now briefly refer to

some of the more important cases sustaining privilege and excise exactions as within the power of the State, and as not violative of the commerce clause of the Constitution.

In the case of *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, this court recognized the right of a State to impose any tax which might be put on messages sent by private parties from one place to another exclusively within its own jurisdiction.

In *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, it was held that the granting of the rights and privileges which constitute the franchise of a corporation may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy, and that the franchise or privilege of being a corporation is personal property and as such is subject to taxation; and, further, that a foreign corporation can not claim a right to do business in another State except subject to the conditions imposed by its laws; that the State, having the absolute power of excluding the foreign corporation, might impose such terms upon permitting the corporation to do business within its limits as it might judge expedient—such as the payment of a specific license tax or a sum proportionate to the amount of its capital; that a tax levied upon the franchise or business of a foreign corporation was not a tax on interstate commerce.

The act of New York provided that certain corporations should be subject to a tax upon their "corporate franchise or business," to be computed by a certain percentage upon their capital stock. Mr. Justice Field, speaking for this court, said:

"No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges."

Further in the opinion it was said:

"There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere."

Referring to the objection that the tax operated as a burden upon interstate commerce, this court said:

"The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

In *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181, it was held that the State could make the grant of the privilege to a corporation to enter the State, or have an office within its limits, conditional upon the payment of a license

tax, and could fix the sum according to the amount of the authorized capital of the corporation, the court saying, through Mr. Justice Fields, that "the absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State." In that case, the statute of Pennsylvania required the plaintiff in error, a Colorado corporation, for the privilege of maintaining an office in the State for the use of its officers, stockholders, agents and employees, the payment of a tax based upon the capital stock of the corporation. The following language is taken from the opinion of the court in that case:

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents and employees; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent."

In the case of *Home Ins. Co.* v. *New York*, 134 U. S. 594, this court held that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose. That such a tax can not be

affected in any way by the character of the property in which its capital stock is invested. Therefore, that the act of New York providing for the payment of a tax upon the "corporate franchise or business" of a company, said tax to be computed upon its capital stock, was not a tax upon the capital stock as property, but was a privilege, excise or business tax; and the fact that the capital stock, or a part of it, was invested in nontaxable securities did not prevent the State from collecting the tax. Mr. Justice Field, who voiced the opinion of the court, said:

"It is true, as said by this court in *California* v. *Pacific R. Co.*, 127 U. S. 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it can not be furnished by the Federal tribunals."

At another point in the opinion:

"And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, as mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

(This language was taken from the opinion in *Delaware Railroad Tax Case*, 85 U. S. 206.)

It was therefore held in that case that a tax upon the capital stock, a part of which was invested in securities which the Constitution exempts from taxation, where the tax was intended for the privilege which the State grants a corporation, was not subject to constitutional objections.

In *Ashley* v. *Ryan*, 153 U. S. 436, it was *held* that the exaction of a charge by a State for the filing of articles of consolidation of several railroad companies forming a connecting line, only one of which is a corporation of the State, as a condition imposed by the State upon the taking of corporate being or the exercise of corporate franchises, constitutes no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and its enforcement involves no attempt on the part of the State to extend its taxing power beyond its territorial limits. The opinion of the court in that case was written by Mr. Justice White and the previous adjudications are referred to therein, the opinion concluding with this language:

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

At this point, let us pause long enough to sum up what seems to be the gist of the decisions from which we have just been quoting. The instant tax as an excise or license tax is a privilege tax, pure and simple, and clearly competent for the State to exact in the exercise of her power over persons and corporations engaged in local business within her borders. As such a tax, it is a regulation of those who desire to transact a corporate business wholly within the State. As such an exaction, it amounts to a yearly license fee or occupation tax, and is not a tax upon property in any sense of the word. It is measured by the capital stock, or so much thereof as is represented by "property owned and used" in its local business and situated within the State. It matters not that the same property may also be used in its interstate business. The line of telegraph decisions, such as—

Postal Telegraph Co. v. *Charleston*, 153 U. S. 692.

Osborn v. *Florida*, 164 U. S. 650.

Williams v. *Talladega*, 226 U. S. 404.

Ewing v. *Leavenworth*, 226 U. S. 464.

Western Union Tel Co. v. *Texas*, 105 U. S. 460, and the very recent case of *Barrett* v. *New York*, U. S. Adv. Ops. 1913, p. 203, which was an express case, clearly establishes that proposition.

The license fee, the excise tax, or whatever name you choose to call it, is not demanded as a prerequisite to the right of the corporation to do an *interstate* business. That is beyond the power of the State. But it is required as a condition precedent to the right of the corporation to do an *intrastate* business. And, unlike the tax or license fees involved in the *Kansas cases*, 216 U. S. 1, and *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, the statute here clearly attempts to make the measure for the tax only that part of the capital stock as is represented by property actually owned and used within the borders of the State, which property is actually used for business wholly within the State. It has never been intimated that the fact that this property might also be used for the transaction of interstate business would make it an improper measure for the license exaction or occupation tax. Certainly, if it may be taxed as property and its value determined on a proportionate basis, as was done in the case of *Western Union Tel. Co.* v. *Attorney General*, *supra*, and the line of similar cases, it would be a proper measure for an excise or license exaction.

The objection to the Kansas statute, pointed out in *Western Union Tel. Co.* v. *Kansas*, *supra*, was that the license fee was measured by all the capital stock, and that, inasmuch as all the capital stock represented all the property of the company, both in and out of Kansas, and all its business, local, interstate and for-

eign, the license fee amounted to no more and no less than a tax and burden upon interstate and foreign commerce and upon property without the jurisdiction of the taxing power. It was clearly intimated in the opinion of the court in the case of *Western Union Tel. Co.* v. *Kansas, supra,* that had the measure of the tax been only upon that part of the capital stock as was represented by the property in Kansas and the local business in Kansas, the decision would have been otherwise, and upon reason the judgment would have necessarily been different.

This is what we mean: The defect in the Kansas statute was that the tax was measured by *all* the property of the company, and by *all* its business, of every character, wherever conducted. It should have been based only upon that part of the property and business which was purely local in its *situs* and transaction. If it had been a property tax instead of a license tax, the same defects would have existed. Now if, instead of measuring the tax by all the company's property and business, or all its capital stock—which this court holds is the same thing—the State of Kansas had enacted that the license fee should be measured by that part of the capital stock as was represented by the property owned and local business transacted in that State, under the decision in *Western Union Tel. Co.* v. *Attorney General, supra,* and similar cases, the tax would have been sustained.

Certainly, if a direct tax upon a proportion of the capital stock, *as property*, such proportion to be ascertained by reference to the entire property and business, interstate and intrastate, is not repugnant to the commerce clause of the Constitution, then it must follow that a license tax computed upon the same basis would not be an invalid exercise of the State's power to regulate corporations and to tax privileges and occupations within her borders. Hence, giving the *Kansas cases* the most extreme construction they will bear, and taking them as unmodified by any subsequent decision of this court, it seems that the Legislature of Arkansas drafted an act which successfully meets the tests indicated in the Kansas decisions, and which contains none of the defects pointed out by this court in the Kansas and the previous Arkansas statutes.

We now approach the question from a slightly different angle. The statute of Arkansas, now before this court for decision as to its constitutionality, assuming that it proceeds from the power of the State to regulate the terms and conditions upon which foreign corporations may transact a wholly local business within its borders, has no reference whatever to the right of such corporation to transact an interstate business. If the Legislature of this State had had any doubts about its power to prescribe terms and conditions upon which foreign corporations might do interstate business here, that doubt was certainly put at

rest when the decision of this court was announced in the case of *Ludwig* v. *Western Union Tel. Co., supra*, wherein an act of this State was declared invalid upon the authority of the *Kansas cases*.

It was announced in no uncertain terms by this court in those cases that the right of a foreign corporation to enter a State for the purpose of doing an interstate business was not subject to the will of that State; that such corporation might enter and transact a purely interstate business, whether the State wished it to do so or not; that the State had no power or authority to prohibit any person from transacting business which amounted to interstate commerce.

With the decision of this court before it, and with no valid act providing for the admission of foreign corporations to do business in Arkansas, the Legislature set about the task of framing an act which would be free from the objections found in the so-called "Wingo Act." The result of its labors will be found in Act No. 87, approved March 8, 1911. It will be noted that this act was passed earlier in the same session which passed Act 112. That act is entitled "An Act to prescribe the fees to be paid by corporations, and for other purposes." Section 2 of the act provides that "all foreign corporations, except those hereinafter specifically mentioned, *doing intrastate business or hereafter seeking to do intrastate business* in Arkansas, shall pay for the privilege of doing *intra-*

state business the same fees as are prescribed in section 1 of this act for domestic corporations; such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in Arkansas."

So we have the Legislature of Arkansas passing an act (No. 87) providing that foreign corporations, for the privilege of doing an *intrastate business* in Arkansas, shall pay certain fees, the same fees that are to be paid by domestic corporations, which fees are to be based upon the proportion of their capital stock represented by property and business in Arkansas. This act prescribed the terms upon which foreign corporations may enter the State for the purpose of doing a local business therein. Afterward, by Act No. 251, the Legislature made provision for the taxation of property belonging to those corporations, and then, by Act 112, prescribed the terms upon which the corporations might continue from year to year to do an intrastate business. Both Act 87 and Act 112 may be reasonably said to have proceeded from the power of the State to regulate the terms and conditions upon which foreign corporations might do local business therein. Taking them together, and construing them as *in pari materia*, the conclusion is irresistible that the Legislature of Arkansas did not intend to do what this court had said so recently it could not do; but, on the other hand, that it only attempted to provide the

terms upon which intrastate business might be transacted by corporations, foreign and domestic.

Indeed, the object, intent and purpose of the acts are so manifest that they do not call for construction. It was so obviously the intent of the Legislature to regulate only the local or domestic business that the Supreme Court of Arkansas, in construing the statute in this case, had no occasion to pass upon the contention made by the appellant railway company before it, that it was an attempt to regulate the business of interstate commerce as well as intrastate commerce. The statutes are so clear that the Supreme Court of Arkansas disregarded, as without merit, this contention of the appellant railway company. Certainly all presumptions in favor of the constitutionality of legislation must be indulged, not only by this court but by all courts, and, as was said by this court in the very recent case of *Barrett* v. *New York*, *supra*:

"In the absence of a controlling State decision construing the group of ordinances in question and the statute authorizing the city to charter business (Greater New York Charter, section 51), we are not satisfied that they were designed, despite the broad definition contained in section 330, to apply to interstate business."

This tax was clearly within the power of the Legislature, and if at any time the corporation desires to give up its intrastate business, it has a perfect right to do so, and upon so doing it is no longer amenable to Act 112. This court has recognized, as we will see

a little further on, the fact that an intrastate carrier has the right to renounce its business if it does not wish to comply with the local regulations. (*Allen* v. *Pullman's Palace Car Co.*, 190 U. S. 171.)

We will now proceed to a further examination of some of the decisions of this court with special reference to the right of the State to regulate its internal affairs, and to prescribe the terms and conditions upon which corporations may transact a local or intrastate business within its borders.

In *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692, an ordinance of the city of Charleston imposing a license fee upon every telegraph company doing business in the city for business done exclusively in the city, not including business done to and from points without the State, or business done for the Government, its officers or agents, was held not to be void as an interference with interstate commerce; and it was further held that messages of a telegraph company sent and delivered entirely within the State are subject to its taxing power. The contention of the telegraph company in that case was, stating it in the language of Mr. Justice Shiras, who delivered the opinion of the court, that "while a State can prohibit a foreign corporation from doing business within its territory, or can impose conditions upon the exercise of its franchises, such power does not exist when such corporations are engaged in interstate commerce, or

are agents of the United States Government." After discussing the cases of *Leloup* v. *Mobile*, 127 U. S. 640, *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411, and the case of *Western Union Tel. Co.* v. *Seay*, 131 U. S. 472, this court denied the contention of the plaintiff in error, summing up in the language of Mr. Justice Miller in the opinion in the case of *Western Union Tel. Co.* v. *Seay*, *supra*, as follows:

"The principle of our cases is, in respect to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without to points within the State, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and, therefore, subject to its taxing power."

The learned justice then uses this language:

"The reasoning of these cases needs no reinforcement, and their conclusions are readily applied to the case in hand.

"The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents.'"

In the case of *Osborne* v. *Florida*, 164 U. S. 650, it was held that an express company is subject to a State license tax on its local business under the Florida statutes as construed by the State Supreme Court, but that it need not take out the license or pay a tax for doing an interstate business. The statute as thus construed was held to be valid and not an interference with interstate commerce. Mr. Justice Peckham, who delivered the opinion of the court, after showing the distinction between the case of *Crutcher* v. *Kentucky*, 141 U. S. 47, said:

"It has never been held, however, that when the business of the company which is wholly within the State is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher case*, that 'taxes or license fees in good faith, imposed exclusively on express business carried on wholly within the State, would be open to no such objection,' viz., an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that ac-

count a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

This case is squarely in point on the proposition that the State can demand a license fee for the privilege of doing an intrastate business, and that the mere fact that the corporation desiring to transact the intrastate business is also engaged in an interstate business has no weight in determining the validity of the statute. It may conduct the interstate business without paying the least attention to the statute; but if it desires to do a local business, it must comply with the local regulation and pay the license fee demanded for that privilege. Under the authority of the cases we have just cited and quoted from, it is manifest that the State of Arkansas was acting within her constitutional powers in prescribing for the payment of a license fee for the doing of a purely intrastate business.

Was an unconstitutional basis adopted as a measure for that license fee? That question will be reached and discussed, if indeed it needs any discussion, before we have left this point.

Just now, however, we desire to call the court's attention to other decisions sustaining the validity of license exactions for the privilege of doing an intrastate business, although that business might be only incident to a larger interstate business.

In the case of *New York* v. *Roberts*, 171 U. S. 658, the New York statute providing for the payment of a franchise or business tax on the amount of capital stock employed in the State by a foreign corporation was again before this court. In that case it was contended by the corporation that the tax as applied to it was invalid because a large portion of its business was the importation and sale of articles in original packages. The case of *Brown* v. *Maryland*, 12 Wheat. 419, and the cases which followed it, were relied upon; and the objection to the payment of the tax was, that the nature of the corporation's business was such that the tax amounted to a burden upon interstate commerce. This argument found support in a most vigorous dissent by Justices Harlan and Brown; but the majority of the court, speaking through Mr. Justice Shiras, after referring to the contention that the case fell within the rule announced in *Brown* v. *Maryland*, *supra*, said:

"But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From

the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it can not be affected in any way by the character of the property in which its capital stock is invested."

In the case of *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, it was held that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State, except with respect to business of a Federal nature.

The case of *Pullman Company* v. *Adams*, 189 U. S. 419, is of special interest. A tax was imposed by Mississippi on sleeping car companies. The act provided that "on each sleeping and palace car company carrying passengers from one point to another within the State, $100, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." It was contended that under the Constitution of Mississippi the Pullman company, being a common carrier, was compelled to do local business, and therefore, when a tax was demanded for the privilege of doing a business which it was compelled to do, and which it could not under the Constitution of Mississippi renounce, that the tax amounted to a burden on commerce between the States. This court, speaking through Mr. Justice Holmes, after referring to this phase of the case, said:

"On the other hand, if the Pullman company, whether called a common carrier or not, had the right

to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne* v. *Florida*, 164 U. S. 650. The company can not complain of being taxed for the privilege of doing a local business which it is free to renounce."

Inasmuch as the Mississippi court had held that the Constitution imposed no such burden upon the Pullman company, this court sustained the validity of the tax.

There is no contention in the instant case that any section of the organic law of Arkansas compels the plaintiff in error to do a local business whether it wishes to do so or not. There was some argument in the lower court directed to the fact that a statute of the State required the plaintiff in error to do a local business, inasmuch as it was a common carrier; but if there is such a statute, of course the effect of the statute now under consideration would be to repeal that statute—that is to say, the State could not through its Legislature make it imperative on the railway company to carry local passengers and local freight and at the same time say, "If you don't pay the license tax for this privilege you will forfeit your right to do a local business in Arkansas." We pass that point as unworthy of any further attention.

In *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171, this court held that an annual tax of $3,000 im-

posed by a State statute upon sleeping car companies which carry one or more local passengers upon cars operating within the State is not void as a burden on interstate commerce, where the company is free to decline all local business if it sees fit. Mr. Justice Day, who delivered the opinion of the court, said:

"Granting that the right exists whereby a State may impose privilege or license fees upon business carried on wholly within the State, it is argued that the tax of $3,000 per annum, collected for carrying one or more local passengers on cars operating within the State, is assessed upon traffic which bears such small proportion to the entire business of the company within the State that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co.* v. *Adams*, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the State of Mississippi, upon each car carrying passengers from one point in the State to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit."

After quoting at length from the opinion of Mr. Justice Holmes in the case of *Pullman Co.* v. *Adams*, *supra*, the opinion in the *Allen* case refers to a statute of Tennessee, enacted in 1875, abrogating the common-

law rule giving a right of action to any person excluded from a public hotel or public means of transportation, and concludes by saying:

"Under this act, no carrier is required to admit any passenger to his car or means of transportation. While the Pullman company may not be technically a common carrier, still we think it comes within the scope and meaning of this act. A sleeping car is obviously a public means of transportation. Under this act, the carrier is not obliged to afford its privileges to those making application therefor. Mr. Justice Blatchford, speaking of the character of the service afforded by sleeping cars, in *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, said: 'The car was equally a vehicle of transit as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself.'

"It follows that a tax imposed upon domestic business, under the circumstances shown, can not be a burden upon interstate commerce in such sense as will invalidate it."

In this connection, attention is called to *Chapter XIX of Kirby's Digest of the Statutes of Arkansas*, which is no more or less than a re-enactment of the common-law rule which the State of Tennessee abrogated in the act referred to in the *Allen* case, *supra*. This common-law rule, which was a part of the Arkansas statutes, was abrogated and repealed by an act of the Arkansas Legislature in 1907 (*Act No. 303, Acts of* 1907).

In *Security Mutual Life Ins. Co.* v. *Prewett*, 202 U. S. 246, this court had before it a provision of the

Kentucky statutes providing that if a foreign insurance company should remove to Federal court a case which had been commenced in a State court, the license of such company to do business within the State should be thereupon revoked. This statute was sustained as within the power of the State in prescribing terms and conditions upon which foreign corporations might do an intrastate business. And yet the right to remove a cause to the Federal courts under certain conditions is *as much a right guaranteed by the Federal Constitution as is the right to engage in interstate commerce.*

A recent case is the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. This case involves the constitutionality of the act of Congress of August 5, 1909, known as the "Corporation Tax Law." Mr. Justice Day, speaking for the court, after reviewing numerous decisions at page 165 of the opinion uses the following language:

"It is therefore well-settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed."

The decisions of this court thoroughly establish the principle that a privilege tax may be actually based upon nontaxable property, and that a tax may be valid as a privilege or license exaction although the same is measured by income produced in part from property which of itself is considered nontaxable. And here is a distinction, recognized by Mr. Chief Justice Holmes in the Massachusetts case of *Mills* v. *Lowell*, 178 Mass. 459, where he said:

"The franchise tax is not a tax on the property of the corporation, and its validity has sometimes depended upon this consideration."

It is thus seen that a tax may be void as a tax upon property, and yet at the same time a similar tax levied in the exercise of the State's power to exact remuneration for the privilege or franchise bestowed would not be objectionable, but, on the other hand, would be a valid and enforceable exaction.

In *Williams* v. *Talladega*, 226 U. S. 404, it was held that a municipal license tax on the right of a telegraph company to do a local business within the State can not be deemed to impose an unconstitutional burden upon its interstate business, because a test for eleven months showed that the company did its intrastate business at that point at a net loss of eighty-six cents. Mr. Justice Day, speaking for the court at page 416 of the opinion, said:

"It is further contended that the tax is unreasonable and unjust because of its effect upon interstate

business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the State to determine. It is contended that the result of the tax upon the intrastate business conducted at a loss is to impose a burden upon the other business of the company, and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a mere denial of Federal right."

In *Ewing* v. *Leavenworth*, 226 U. S. 464, this court held that an annual privilege tax levied by a municipality upon the business of an express company, expressly excluding commerce of an interstate character and business done for the Government, and covering solely the local business done at that point in receiving packages transported from other points in the State, and in transporting packages to like points, is not invalid because such transportation is over a route which, for a short distance, passes out of the State. In the course of the opinion, Mr. Justice Day said:

"We are of opinion that this case is controlled by *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192, in which it was held that a State might tax the receipts of a railroad corporation for the portion of the transportation which was within the State, although the transportation then in question, while between points within the State, passed over the railroad which traversed for a part of the way territory of an adjoining State. It was held that a tax upon such receipts did not tax interstate commerce, and this court said (p. 202):

" 'It should be remembered that the question does not arise as to the power of any other State than the State of the *termini*, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk.' "

The most recent announcement of this court will be found in the cases of *Baltic Mining Co.* v. *Massachusetts*, and *S. S. White Dental Mfg. Co.* v. *Massachusetts*, decided November 3, 1913, and reported in U. S. Adv. Ops. 1913, p. 15, 231 U. S. 68. In those cases a statute of Massachusetts was under examination which provided for the payment of an excise tax by foreign corporations, to be computed at one-fiftieth of one per cent on all the authorized capital stock of the corporation, the maximum amount of the tax to be not to exceed $2,000. The act also provided for the forfeiture and collection of penalties, and for the issuance of injunctions until the payment of such penalties and the filing of certificates provided for by the act. Mr. Justice Day, who delivered the opinion of the court, after citing and referring to some of the previous decisions of this court, said:

"It is the commerce itself which must not be burdened by State exactions which interfere with the ex-

clusive Federal authority over it. A resort to the receipts of property or capital employed in part, at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the State, has been sustained."

And in concluding that part of the opinion which dealt with the legality of the tax as measured by the commerce clause, the court further said:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. Insofar as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

It would seem that this language is a reaction from the decision in *Western Union Tel. Co.* v. *Kansas*, *supra*, and the cases which immediately followed it, because in that case it was expressly stated in the opinion that the Kansas act was invalid, because it was in effect imposed upon property beyond the State's jurisdiction; whereas, in the Massachusetts cases which we are now discussing, a similar statute was said not to operate as a tax upon property beyond the State, but that such property was only used as a measure of taxation. It is true there is language in the opinion

from which we have just quoted which denies any disposition "to limit the authority of those cases" (the Kansas and similar cases); but we have been unable to reconcile the language just quoted with that contained in the opinion of the majority in the *Kansas cases*. After discussing the *Kansas cases*, the learned Justice sums up as follows:

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce, or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

We regard these late cases from Massachusetts as absolutely conclusive of the question now before this court. Indeed, the Arkansas statute must be viewed in a much more favorable light than

was the Massachusetts statute, because, in the Massachusetts act the tax was based upon the entire property of the corporation, no matter where located, whereas the Arkansas act bases the tax only upon that portion of its property which is actually situated in Arkansas and which is actually used in the transaction of interstate business in Arkansas. It will be seen that the measure of the tax does not take into consideration any property beyond the taxing jurisdiction of the State of Arkansas, and, as we have attempted to show in a previous subdivision of this argument, even as a property tax, the act is valid.

That portion of the corporation's property which is made the basis or measure of the tax being actually within Arkansas, and being actually used for the transaction of Arkansas business, any burden placed thereupon would be a burden placed upon property actually within the jurisdiction of the State of Arkansas, and would not be a burden upon interstate commerce, although the property might be used for the purpose of transacting an interstate business, as well as for the purpose of transacting a local business. Certainly, if this is true as to the tax, viewed as a property tax, it is also true of the tax viewed as a privilege tax. If the State of Massachusetts could demand, for the privilege which it grants a foreign corporation to do business in Massachusetts, an excise tax measured by all its property, as represented by its entire capital stock, surely

the State of Arkansas can exact an excise tax for the same privilege and business if based upon that proportion of the capital stock represented by the property of the corporation actually in Arkansas and actually used in business transacted in that State. It seems clear that there is nothing unlawful in the tax itself, nor in the measure adopted for ascertaining the amount of the tax. And it is certain that it does not bear upon any part of the corporation's property except that which is situated in Arkansas.

The Massachusetts cases just cited and quoted from involved a tax much more nearly like that condemned in the Kansas cases than is the tax in the instant case; and the language we have quoted from the opinion in the Massachusetts cases is most appropriate here. It must be borne in mind that the tax exacted, if an excise tax, is only for the privilege of doing a local business. If the corporation does not desire to do that sort of business, it need not pay any attention to the act, and the tax will not be imposed upon it.

In the lower court, the plaintiff in error relied chiefly upon the decisions of this court in *Galveston, H. & S. A. R. Co.* v. *Texas, supra*, and *Myer* v. *Wells Fargo & Co., supra*. The tax here involved is so different from the taxes condemned in those cases that the distinction seems clear without argument.

The Texas statute came fairly within the rule announced by this court in *Philadelphia & S. Mail S. S.*

Co. v. *Pennsylania*, 122 U. S. 326. It was laid directly upon receipts from interstate commerce. It did not pretend to be an occupation tax, nor an excise exaction, nor a license fee, the measure of which was to be found by receipts from domestic commerce, or from a fairly computed proportion of the receipts from interstate commerce, as was the case in the statute approved in *Maine* v. *Grand Trunk R. Co., supra.* Whereas, in the instant case, the tax falls clearly within the approval of this court as announced in *Maine* v. *Grand Trunk R. Co., supra.* Indeed, the tax here involved is much further from constitutional objection than was the tax approved in *Maine* v. *Grand Trunk R. Co., supra.* Under the Maine statute, the receipts from interstate commerce, fairly apportioned, was the measure for the value of the privilege which was sought to be taxed. In our statute, no effort is made to tax the gross receipts as property, nor even to make any part of those receipts a measure for the value of the privilege for the exercise of which the excise was imposed. But on the other hand, the measure of that taxable value which is established by the statute, is that proportion of the capital stock represented by "property owned and used in business transacted in this State," which is but another way of saying that the measure of the tax is to be found in the amount of property owned in Arkansas. Surely there is no objection to such a tax, or to the exact amount of that tax being ascertained in any such manner.

This brief was in type before counsel for defendant in error were favored with the brief of plaintiff in error, the time for the service of the brief having been waived.

Reference is made in the brief of plaintiff in error to the Arkansas case of *Freeo Valley Ry. Co.* v. *Hodges*, 105 Ark. 314. In that case the Supreme Court of Arkansas held that *section* 957, *Kirby's Digest*, authorizing corporations voluntarily to surrender their charters, did not apply to domestic railroad corporations. As to railroad corporations, the State Board of Railroad Incorporation having the power to grant charters, also had the power to allow charters to be surrendered, and that a railroad corporation desiring to surrender its charter should apply to the State board for authority so to do.

That case does not affect the rights of a foreign railroad corporation. Act 112 provides the terms upon which a railroad corporation may do an intrastate business. If a corporation continues to do an intrastate business it is liable to the license tax imposed by Act 112. If it refuses to pay this tax, it is liable to suit and, under certain circumstances, to the forfeiture of its permit to do local business. *The State does not compel it to do a local business.* Act 112 leaves it free to choose whether it will exercise the right. If it does, it becomes liable to the tax, if it doesn't, it is not liable. Its charter may be forfeited if it exercises the privilege of doing

local business and wilfully refuses to pay the tax. Any liability it assumes as to the tax is purely voluntary.

There is no question here of an attempt to renounce local business and a denial of that right by the State. No such question is raised, nor under the facts, could be raised.

IV.

THE TAX HERE INVOLVED DOES NOT DENY TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS, NOR DEPRIVE IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT.

In the answer which plaintiff in error filed to the complaint of the State, it was alleged that the act prescribing the tax sought to be collected was contrary to the Constitution of the United States, in that it denied the plaintiff in error the equal protection of the laws, and deprived it of its property without due process of law. In the brief filed by the plaintiff in error in the lower court, neither of these propositions were urged, no argument being directed to the points. We deem it hardly necessary at this time to devote any space to these contentions. We shall but briefly refer to some of the adjudicated cases which fully answer them.

In *Davidson* v. *New Orleans*, 96 U. S. 97, this court said that the "Federal Constitution imposes no restrictions on the State in regard to unequal taxation."

In *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461, we find this language:

"Indeed, this whole argument of the right under the Federal Constitution to challenge the tax law on the ground of burdens resulting from the operation of the

law is put at rest in the decision in *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232."

In *Coulter* v. *L. etc. R. Co.* 196 U. S. 599, it was said:

"If it be a fact that the franchise of the Kentucky corporation is taxed at a different rate from the intangible property in the State, there can be no question that the State had the power to tax it at a different rate, so far as the Constitution of the United States is concerned."

There is no denial of the equal protection of the laws where steam railroads in a State are exempt from a tax laid on street railroads.

Savannah, etc. R. Co. v. *Savannah*, 198 U. S. 392.

Nor is there a denial of the equal protection of the laws when underground city railways are exempted from a tax which is levied on surface roads.

Metropolitan St. R. Co. v. *New York*, 199 U. S. 1.

And the equal protection of the laws is not denied where railroad property is assessed at a higher valuation than other property.

St. L., etc. R. Co. v. *Davis*, 132 Fed. 629.

Upon this point, see also the cases of:

Barbier v. *Connolly*, 113 U. S. 27, and

Magoun v. *Illinois Trust Savings Bank*, 170 U. S. 283.

The Federal Constitution offers no barrier to double taxation where property is practically made to contribute twice to the same levy by reason of different forms of taxation, or different interests therein held by different persons.

Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232.

Tennessee v. *Whitworth*, 117 U. S. 129.

Bank of Commerce v. *Tennessee*, 161 U. S. 134.

Home Ins. Co. v. *New York*, 134 U. S. 594.

In the Massachusetts cases (*Baltic Min. Co.* v. *Massachusetts*, and *S. S. White Dental Mfg. Co.* v. *Massachusetts*), *supra*, the same point was urged. Mr. Justice Day disposed of it in the following language:

"It is further contended that the imposition of the tax denies the equal protection of the laws, and this upon the authority of *Southern R. Co.* v. *Greene*, 216 U. S. 400. In that case the railway company had gone into the State of Alabama, and, under authority of the State, acquired a large amount of railroad property, upon which it paid taxes as well as a license tax imposed by the State. After the payment of all such taxes, and in this condition of affairs, the State undertook to levy upon the railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning of the Constitution, and entitled to the equal protection of the laws, and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said in that case (p. 416):

" 'We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.'

"The conditions existing in the *Southern R. Co.* v. *Greene case* are not presented here. It is true that the plaintiffs in error paid taxes assessed against foreign corporations before the passage of the law of 1909, and that the White Dental Company had a leasehold for storerooms in the State; but we do not find in this situation an acquisition of permanent property, such as was shown in the *Greene case.* And there is no question of the continued authority of the State to tax a foreign corporation for the privilege of doing business within its borders, which authority the State possesses so long as it does not violate rights secured by the Federal Constitution. Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a State to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

The court's attention is directed to the fact that in the instant case domestic corporations are made to pay precisely the same taxes in every respect that are required of foreign corporations. There is no discrimination whatever between corporations. They all come within the same class and pay the same taxes, regardless of the place of their domicile.

On the question of whether the corporation is being deprived of its property without due process of law, we shall do no more than refer to a few cases which completely answer this contention:

Spencer v. *Merchant*, 125 U. S. 345.

King v. *Portland City*, 184 U. S. 61.

Carson v. *Sewerage Comm'rs of Brockton*, 182 U. S. 398.

Williams v. *Eggleston*, 170 U. S. 304.

In the case of *Spencer* v. *Merchant*, *supra*, Mr. Justice Gray used the following language, which is peculiarly appropriate here:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited."

There is absolutely nothing in the present tax which would operate as a deprivation of property without due process of law. The procedure which the Legislature has established is regular in all respects. The Tax Commission, duly and legally existing under the Constitution and laws of Arkansas, is required to compute the tax upon sworn statements made to them by the taxpayers. No provision is made for a summary seizure of property to satisfy the tax, but it is provided that it shall be collected by suit. The well-recognized and generally approved right to issue a distress warrant for the collection of the tax is not resorted to. If there is any error, irregularity or fraud in the levy of the tax, the remedy to correct that in the courts of the State is ample, not only by injunction in the equity courts, but by writ of *certiorari* from the law courts to review and correct and, if need be, quash the findings and orders of the Tax Commission, a board whose actions are by the Arkansas statutes, subject to review by the circuit courts of the State. (*Kirby's Digest, section* 1315.)

IN CONCLUSION.

It is confidently submitted that, viewed either as a tax upon property or as an excise or income tax, Act No. 112 is subject to no constitutional objection. Such burdens as it imposes are burdens upon property actually within the State, and upon business internal to the State, and over which the State alone has control. Interstate commerce is in no wise affected by the statute. The receipts from interstate commerce are not made the measure for the tax, nor are those receipts taxed themselves, or any part of them. No part of the property of the corporation beyond the State is taxed, nor is any part of that property beyond the borders of the State made the measure or basis for the tax. But, on the other hand, resort is made only to that property actually within the jurisdiction of the sovereign which lays the tax.

Upon no view of the tax can the statute be said to run counter to any provision of the Federal Constitution. It is, therefore, respectfully submitted that the judgment of the Supreme Court of Arkansas should be affirmed.

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Attorneys for Defendant in Error.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 119. Argued February 25, 26, 1914.—Decided December 7, 1914.

While this court is concluded as to the mere construction of a state tax statute by the decision of the highest court of the State, it is not concluded by the state court's characterization of the scheme of taxation in determining whether it deprives a party of rights secured by the Federal Constitution.

In determining the nature of a state tax and constitutionality of the statute imposing it, this court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced.

A state statute imposing an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount being fixed solely by reference to the property of the corporation within that State and used in intra-state business and excluding any imposition upon or interference with interstate commerce, does not run counter to, and is not unconstitutional under, either the commerce clause of, or the Fourteenth Amendment to, the Federal Constitution; and so *held* as to those provisions of the Annual Franchise Tax Statute of Arkansas of 1911, involved in this case.

Such a tax is not repugnant to the due process clause on the ground of being in effect a tax upon property beyond the State as it is measured by reference to property situate wholly within the State.

Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, and may take the form of a tax for privilege of exercising its franchise within the State, if measured on value of property wholly within the State, and provided payment of the tax be not made a condition precedent to carrying on business including interstate business, but the enforcement of the tax left to ordinary means for collection of taxes. *Postal Tel. Co.* v. *Adams*, 155 U. S. 688.

Nothing in the Fourteenth Amendment imposes an iron clad rule upon States with respect to internal taxation, or prevents double taxation or any other form of unequal taxation so long as the inequality is not based on arbitrary distinctions.

A provision in a state statute forfeiting the right of a foreign corporation engaged in interstate commerce to transact interstate commerce within the State on account of non-payment of a tax imposed on such corporations as to their intra-state business, might render the statute unconstitutional as a regulation of interstate commerce unless it could be treated as separable.

This court will not regard such a provision of the statute as inseparable and strike down the entire statute in advance of such a construction by the state court in a case to collect the tax as a debt and not to forfeit the franchise for non-payment.

In exercising jurisdiction under § 237, Judicial Code, this court should wait until the state court has construed the statute attacked rather than to assume that the state court will construe it so as to make it repugnant to the Federal Constitution.

If a statute will bear two constructions, one within and the other beyond constitutional limitations, the courts should adopt the former, as legislatures are presumed to act within their authority.

In construing the Arkansas Annual Franchise Tax Statute of 1911 this court will assume, until the State places a different construction upon it, that the provision for forfeiture for non-payment is limited in its operation to intra-state commerce, or else if construed as applying to interstate commerce it will be treated as void for unconstitutionality under the commerce clause and severable from the other provisions of the statute.

106 Arkansas, 321, affirmed.

THE Attorney General of Arkansas, proceeding under Act No. 112, approved March 23, 1911, entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," (Acts of Arkansas, 1911, p. 67), brought this suit in one of the courts of the State to recover a tax levied against the St. Louis Southwestern Railway Company by the state Tax Commission under the provisions of that act for the year 1911, amounting to the sum of $6,798.26, besides a penalty and interest.

The act is one of three that were passed by the General Assembly during the same year, designed for the purpose of obtaining revenue from corporations doing business in the State. The first of these is Act No. 87, approved March 8 (Acts 1911, p. 48), which prescribes the fees to

be paid by domestic corporations for the filing of their articles of incorporation and by foreign corporations for the privilege of doing intra-state business in Arkansas. Its eighth section requires railroad and other transportation companies organized under the laws of the State to pay incorporation fees based upon the mileage of their lines; and, by § 9, "All foreign railroad, street, interurban or other transportation companies now doing intra-state business, or desiring to engage in intra-state business, or authorized to engage in intra-state business, shall, before being permitted to continue to do intra-state business, or authorized to engage in intra-state business, shall pay the same fees as are required of such domestic corporations."

Act No. 112 provides for what are called "annual franchise taxes" on corporations doing business in the State. The first three sections refer to domestic corporations doing business for profit. Sections 4 and 5 require each foreign corporation for profit doing business in the State, and owning or using a part or all of its capital or plant in the State, to make an annual return to the Tax Commission, showing among other things the total amount of its capital stock, the market value of the same, and the value of property owned and used by it, within and without the State respectively. Section 6 provides that the Commission, from the facts thus reported and any other facts bearing upon the question, shall determine "the proportion of the authorized capital stock of the company represented by its property and business in this State," and shall report the same to the Auditor, who shall charge and certify to the Treasurer for collection annually from such company, "in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State, one-twentieth of one per cent. each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in

business transacted in this State." Section 12 requires the Attorney General to collect the tax, with an added penalty for delinquency in payment, by suit to be brought in the name of the State. By § 14 the tax and penalty are made a first lien upon all property of the corporation. By § 15, if a corporation "organized under the laws of Arkansas or any foreign country authorized to do business in this State for profit" fails or neglects to make the report or pay the tax prescribed for thirty days after the expiration of the time limited by the act, and the default is willful and intentional, an action may be brought by the Attorney General or prosecuting attorney to forfeit and annul the charter of the corporation, and "if the court is satisfied that such default is wilful and intentional it shall revoke and annul such charter." By § 20, when any corporation shall have paid the franchise tax prescribed by the act, the Tax Commission, or the Secretary of State if the Commission be abolished, is required to issue to it a certificate authorizing it to do business in the State for the term of five years, upon condition that it pay annually the franchise tax prescribed by the Act, and such certificate is made evidence in all the courts of the State of the right of the corporation to do business in the State during the term of the certificate. And, "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act." By Act No. 313, approved May 26, 1911 (Acts 1911, p. 285), Act No. 112 was amended with respect to the time of its taking effect, and in another particular not now pertinent.

On May 4, the Legislature passed Act No. 251, entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph,

telephone and pipe lines companies." (Acts of Arkansas, 1911, p. 233.) This provides that the property of railroad corporations, and of the others named in the title, shall be assessed by the Tax Commission. Section 2 is as follows:

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Section 9 requires railroad companies to file with the Tax Commission statements showing their physical property in the State. Section 10 requires that the statement shall show "the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing."

The defendant, a Missouri corporation, owning and operating lines of railroad in the States of Missouri, Arkansas and other States, over which it carries both intrastate and interstate commerce, made its report for the year 1911 in accordance with Act No. 112, but under protest, reserving the right to contest the validity of the Act. This report, among other things, showed that the total amount of authorized capital stock was $55,000,000.00 and the total amount of issued and outstanding capital stock was $36,249,750.00. The Commission found the

proportion of the outstanding capital stock represented by property owned and used by defendant in business transacted in the State of Arkansas for the year 1911 to be $13,596,520.00, on which the franchise tax amounted to $6,798.26.

The complaint filed in behalf of the State herein set forth the making of the report by defendant as mentioned and the taking of the necessary proceedings to fix its responsibility under the provisions of Act No. 112.

Defendant's answer, besides setting up its status as a railway corporation incorporated under the laws of Missouri, owning and operating a railway line in Arkansas and several other States, and engaged as a common carrier in interstate business in those States, and also doing intrastate business in the State of Arkansas pursuant to its laws, averred that its property in that State was assessed for the purposes of general taxation for the year 1910 at the value of $9,155,965.00 and the tax levied thereon amounted to $191,713.95, which defendant paid; and that under Act No. 251, approved May 4, 1911, the state Tax Commission assessed its property within the State for tax purposes for the latter year at the value of $11,260,240, upon which assessment taxes had been levied in the sum of $239,388.84, which defendant offered to pay (and has since paid), and averred that the tax sued on "is a tax upon the privilege and right of this defendant to do both an interstate and intra-state business in the State of Arkansas, and is a tax upon the interstate business, property and income of the defendant, and is a tax placed and imposed upon defendant for the privilege of engaging in interstate commerce and an attempt to regulate interstate commerce and a burden thereon; and that if said Act is enforced defendant will be deprived of its right to engage in an interstate business in and through the State of Arkansas." The answer also challenged the validity of Act No. 112, as applied and attempted to be enforced against

defendant, on the ground that it amounted to a taking of its property without due process of law and a denial of the equal protection of the laws.

The Attorney General's demurrer to this answer was sustained, and, the defendant declining to plead further, judgment was entered for the tax and penalty sued for.

The Supreme Court of the State affirmed the judgment (106 Arkansas, 321), and the present writ of error was sued out.

Mr. William T. Wooldridge, with whom *Mr. Samuel H. West*, *Mr. Edward A. Haid* and *Mr. Frank G. Bridges* were on the brief, for plaintiff in error:

Act No. 112, of Arkansas, as construed by the Supreme Court of Arkansas, being the necessary basis for this suit, and being, by its terms and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Leathe* v. *Thomas*, 207 U. S. 93; *Houston &c. R. R.* v. *Mayes*, 201 U. S. 321; *Wabash &c. Ry.* v. *Illinois*, 118 U. S. 557; *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477.

The act as so construed is void, because the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiff in error which is engaged in and devoted to interstate commerce. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *Leloup* v. *Mobile*, 127 U. S. 640; *West. Un. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *West. Un. Tel. Co.* v. *Alabama*, 132 U. S. 472; *G. H. & S. A. Ry.* v. *Texas*, 210 U. S. 217; *Fargo* v. *Hart*, 193 U. S. 490; *A. & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Webster* v. *Bell*, 68 Fed. Rep. 183; *State Freight Tax Cases*, 15 Wall. 232; *Express Co.* v. *Seibert*, 142

U. S. 339; *Postal Tel. Co.* v. *Adams*, 155 U. S. 688; *Allen* v. *Pullman Co.*, 191 U. S. 179; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 216; *Williams* v. *Talladega*, 226 U. S. 404; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Freeo Valley R. R.* v. *Hodges*, 105 Arkansas, 314; *Adams Express Co.* v. *New York*, 232 U. S. 14.

The act as so construed, in connection with Act No. 251, subjects the property of plaintiff in error to double taxation and the tax is in violation of the due process of law clause, and because it attempts to impose taxes upon property beyond the jurisdiction of the State of Arkansas; the tax also denies to plaintiff in error equal protection of the law. *A. & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 165; *Post. Tel. Co.* v. *Adams*, 155 U. S. 688; *Galveston &c. Ry.* v. *Texas*, 210 U. S. 217; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Atchison &c. R. R.* v. *O'Connor*, 223 U. S. 280; *Southern Ry.* v. *Greene*, 216 U. S. 400; *Harris Lumber Co.* v. *Grandstaff*, 78 Arkansas, 187.

Mr. William H. Rector, with whom *Mr. William L. Moose*, Attorney General of the State of Arkansas, *Mr. De E. Bradshaw*, *Mr. Lewis Rhoton* and *Mr. Thomas E. Helm* were on the brief, for defendant in error:

The right of the State to exact from a railway company a tax upon that portion of its property actually within its borders, and, in assessing it for the purposes of taxation, to take into consideration its value as a going concern and as a part of a general system extending over several States, is thoroughly established by the decisions of this court, and is not inhibited by Art. I, § 8, of the Federal Constitution. *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *West. Un. Tel. Co.* v.

Taggart, 163 U. S. 1; *West. Un. Tel. Co.* v. *Attorney General*, 125 U. S. 530; *Same* v. *Same*, 141 U. S. 40; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *Pittsburg &c. R. R.* v. *Backus*, 154 U. S. 421; *Cleveland &c. R. R.* v. *Backus*, 154 U. S. 439; *Indiana Express Company Cases*, 165 U. S. 256; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 171.

As construed by the Supreme Court of Arkansas, the tax here involved is a legal exaction, intended to reach and make amenable to taxation an element of value which is a well-recognized factor in ascertaining the full value of corporate property, and which expressly has been omitted from taxation in the general enactments relative to the assessment and collection of taxes upon property owned by railway corporations and actually situated in the State of Arkansas. As thus construed, it is not a burden upon interstate commerce nor upon the right of the plaintiff in error to engage in such commerce, and it is therefore not repugnant to Art. I, § 8, of the Constitution of the United States. *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pittsburg &c. R. R.* v. *Backus*, 154 U. S. 421; *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1; *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *West. Un. Tel. Co.* v. *Attorney General*, 145 U. S. 549; *Galveston &c. R. R.* v. *Texas*, 210 U. S. 217; *Myer* v. *Wells-Fargo & Co.*, 223 U. S. 298; *Fargo* v. *Hart*, 193 U. S. 490; *Wisconsin &c. R. R.* v. *Powers*, 191 U. S. 379.

If the tax be regarded as a privilege, license or excise tax, rather than as a tax upon property, it is nevertheless a valid exercise by the State of its right to prescribe the terms and conditions upon which corporations may

transact an intrastate business within its borders, and, inasmuch as it is not based in whole or in part upon interstate business or upon property beyond the State, it is not violative of the Federal Constitution as amounting to a burden upon interstate commerce. *Hammond Packing Co.* v. *State*, 212 U. S. 322; *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103; *Security Ins. Co.* v. *Prewett*, 202 U. S. 246; *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *John Hancock Ins. Co.* v. *Warner*, 181 U. S. 73; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Horn Silver Co.* v. *New York*, 143 U. S. 305; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *California* v. *Pacific R. R.*, 127 U. S. 41; *Ashley* v. *Ryan*, 153 U. S. 436; *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692; *Williams* v. *Talladega*, 226 U. S. 404; *Ewing* v. *Leavenworth*, 226 U. S. 464; *Adams Express Co.* v. *New York*, 232 U. S. 14; *New York* v. *Roberts*, 171 U. S. 658; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Mills* v. *Lowell*, 178 Massachusetts, 459; *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326.

The tax does not deny to plaintiff in error the equal protection of the law, nor deprive it of its property without due process of law, and is not repugnant to the Fourteenth Amendment. *Davidson* v. *New Orleans*, 96 U. S. 97; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Coulter* v. *Louisville & Nashville R. R.*, 196 U. S. 599; *Savannah &c. R. R.* v. *Savannah*, 198 U. S. 392; *Met. St. R. R.* v. *New York*, 199 U. S. 1; *St. Louis &c. R. R.* v. *Davis*, 132

Fed. Rep. 629; *Barbier* v. *Connolly*, 113 U. S. 27; *Magoun* v. *Illinois Sav. Bank*, 170 U. S. 283; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68; *Spencer* v. *Merchant*, 125 U. S. 345; *King* v. *Portland City*, 184 U. S. 61; *Carson* v. *Brockton*, 182 U. S. 398; *Williams* v. *Eggleston*, 170 U. S. 304.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The validity of Act No. 112, and of the tax that, pursuant to its provisions, has been levied against plaintiff in error, is questioned on the ground of repugnancy to the commerce clause of the Constitution of the United States and the "due process" and "equal protection" clauses of the Fourteenth Amendment.

The act is entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," (Acts of Arkansas, 1911, p. 67). Its fourth, fifth, and sixth sections require each foreign corporation for profit doing business in the State, and owning or using a part or all of its capital or plant in the State, to pay "for the privilege of exercising its franchise in this State, one-twentieth of one per cent. each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." On the other hand, Act No. 251, approved May 4, 1911 (Acts of Arkansas, p. 233), is entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph, telephone and pipe lines companies." By its second section the franchises (other than the right to be a corporation) of all railroad, express, telegraph, and telephone companies are declared to be

property for the purpose of taxation, and the values of such franchises are to be considered by the assessing officers when assessing the p.operty of such corporations.

The Supreme Court of the State, in its opinion herein, after reciting the pertinent provisions of the state constitution, went on to say (106 Arkansas, 326): "Our court has held that a corporation owes its existence to the State, and the right to enjoy this privilege is a subject of taxation, and that upon the power of the legislature to impose such a tax there exists no restriction in our Constitution. In the case of a foreign corporation, the tax or license is paid for the privilege of exercising its corporate powers in the State. *Baker* v. *State*, 44 Arkansas, 138, and cases cited. . . . (p. 327): In the passage of the act in question [Act No. 112], no doubt the legislature had in mind the fact that the right or privilege to be or exist as a corporation, although a matter of value to the stockholders of the corporation, is not an asset of the corporation and transferable as such, and that its value can not, under ordinary rules, be ascertained for the purpose of taxation as property, but since it is a privilege or right granted by the State, a franchise tax may be imposed upon this right or privilege for the purpose of raising revenue. We think it plain, then, under our Constitution and decisions, that the act in question is valid unless it be held a burden upon interstate commerce." And, after citing certain decisions of this court bearing upon the latter question, the court proceeded (p. 329): "In the case at bar the gross receipts from all sources of the railway company have not been used as a means for ascertaining the value of the property in the State. By the express provision of Act No. 251, enacted for the purpose of providing the manner for assessing for taxation the property of railroad companies, the right to be or exist as a corporation was expressly excluded from the items which go to make up the value of the property of the corporation. As we have

already seen, the right or privilege to be or exist as a corporation is the subject of taxation, and this right or privilege is not considered in fixing the value of the property of corporations under Act No. 251, the general tax act. Our State has fixed a franchise tax based solely 'upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this State.' The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, and *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so. It will be noted in the *Ludwig Case*, the statute requires a foreign corporation engaged in interstate commerce to pay as a license tax for doing intra-state business, a given amount on its capital stock whether employed within the State or elsewhere, and the court held that on the authority of the *Kansas Case*, the statute in question was unconstitutional and void because it directly burdened interstate commerce and imposed a tax on property beyond the jurisdiction of the State."

Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State. *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *Williams*

v. *Mississippi*, 170 U. S. 213, 225; *Smith* v. *St. Louis & Southwestern Ry.*, 181 U. S. 248, 257; *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Reid* v. *Colorado*, 187 U. S. 137, 151; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217, 227; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162; *Sioux Remedy Co.* v. *Cope*, decided November 30, 1914, *ante*, p. 197.

We therefore accept the construction of Act No. 112, that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in business transacted within the State, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intra-state business; and this exposition of Act No. 112 brings it into harmony with Act No. 87 (quoted in the prefatory statement) which requires foreign corporations to pay initial fees only for the privilege of doing intra-state business; and renders it harmonious, also, with Act No. 251, under which the franchise of corporate existence is excluded from the assessment.

And we proceed to consider whether, in view of the construction thus placed upon Act No. 112, the franchise tax imposed upon plaintiff in error pursuant to its terms runs counter to the commerce clause or the Fourteenth Amendment.

The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the

volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; and *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335.

And we have no hesitation in overruling the contention that the tax is repugnant to the "due process" clause on the ground of being in effect based on property located beyond the limits of the State, as in *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 30; and in *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162; for this tax is measured by reference to property situate wholly within the confines of the State.

So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly

thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

So, in *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, the court, reviewing numerous previous cases, laid down certain propositions as well-established, and among them the following: (a) No State can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce; (b) This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (c) The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States.

Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the State. It is fixed at a definite percentage ($\frac{1}{20}$ of one per cent.) of "the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State," and the Act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the State and that owned and used by it outside of the State. In its essence the tax is not distinguishable from that which was sustained by this court in *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, and in another case between the same parties, 141 U. S. 40. See also *Pittsburgh &c. Ry.* v. *Backus*, 154 U. S. 421, 430, 435; *Indianapolis &c.*

R. R. v. *Backus*, 154 U. S. 438; *Cleveland &c. Ry.* v. *Backus*, 154 U. S. 439, 444, 445; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 18; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412, 424.

It is insisted that Act No. 112, as construed by the state court, in connection with Act No. 251, subjects the property of plaintiff in error to double taxation, and that this contravenes the constitutional guaranties respecting due process of law and the equal protection of the laws. No attempt is made to show that the classification of corporations adopted in Act No. 112 is not a reasonable one, or that in any respect corporations of the class to which plaintiff in error belongs are discriminated against in favor of domestic corporations, as was the case in *Southern Railway Co.* v. *Greene*, 216 U. S. 400. Under the first three sections of this act, each corporation organized and doing business under the laws of the State for profit is required to pay a tax of one-twentieth of one per cent. upon "that part of its subscribed or issued and outstanding capital employed in Arkansas," with an exception not now pertinent; whereas by the next three sections each foreign corporation for profit doing business in the State and owning or using a part or all of its capital or plant in the State is required to pay according to the same percentage "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." It is not contended that there is here any substantial discrimination. The gist of the criticism seems to be that the two acts in question subject the property of plaintiff in error, as well as that of all other corporations that are within the operation of those Acts, to double taxation, and that this is a denial of "equal protection" in favor of other classes of taxpayers. Reference is made to an extract from the opinion in the *Adams Case* (155 U. S. 696) where the court said: "Doubtless, no State could add to the taxation of prop-

erty according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland &c. Ry.* v. *Backus*, 154 U. S. 439, 445." This, however, does not mean, as is contended, that because of the Fourteenth Amendment a State may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the State, including that employed in interstate commerce. The court was dealing only with the Commerce Clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445.

Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the in-

equality is not based upon arbitrary distinctions. *Davidson* v. *New Orleans*, 96 U. S. 97, 105, 106; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 228; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 295; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Michigan Central R. R.* v. *Powers*, 201 U. S. 245, 293.

Thus far we have dealt only with the authority of the State to levy a tax of this character, and with the mode in which the amount of the tax is ascertained. But the case presents another question that is more serious. By § 20 of Act No. 112 it is enacted: "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act."

If this must needs be construed to mean that for non-payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intra-state and interstate commerce is to forfeit its right to do business in the State, not only with respect to intra-state but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; unless, indeed, § 20 could be treated as separable. This result would follow from the principles laid down in *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 554; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 644, 647; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472, 477; *Allen* v. *Pullman Co.*, 191 U. S. 171, 179; and many other cases.

But the state court has not as yet construed the section

as calling for the forfeiture of the privilege of doing interstate business in the event of non-payment of the franchise tax; nor is the State here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its non-payment. *Non constat* but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to § 20 is confined to intra-state commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by § 237, Jud. Code, it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. *Bachtel* v. *Wilson*, 204 U. S. 36, 40; *Adams* v. *Russell*, 229 U. S. 353, 360; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. And see *Ohio Tax Cases*, 232 U. S. 576, 591. At present, therefore, we have merely to consider whether § 20 so clearly requires a forfeiture of the interstate franchise for non-payment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. *United States* v. *Coombs*, 12 Pet. 72, 76; *Grenada County Super-*

visors v. *Brogden*, 112 U. S. 261, 269; *The Japanese Immigrant Case*, 189 U. S. 86, 101. It hardly needs to be said that the Supreme Court of Arkansas recognizes and applies this fundamental rule of construction. *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466, 477; *Waterman* v. *Hawkins*, 75 Arkansas, 120, 126; *State* v. *Moore*, 76 Arkansas, 197, 201.

It does not seem to us that § 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the State for profit, whether organized under its laws, or under the laws of other States, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore it was natural that, in such a provision as is contained in § 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several kinds of corporations that are subject to the act. The forfeiture in terms is of "the right of such corporation to do business in this State." This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter. That topic is covered by § 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other States, to which class plaintiff in error belongs.

In view of all these considerations, we ought to assume, until the State, through its judicial or administrative officers, places a different construction upon the act, that § 20 will be limited in its operation to forfeiting for nonpayment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view it is ob-

vious, from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

END

OF

CASE